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LIMITATIONS OF THE RULE THAT HE WHO COMES INTO A COURT OF EQUITY MUST COME WITH CLEAN HANDS.

The cases which involve the above rule are numerous and the field of its operation very broad. It nevertheless has its limitation and there is a class of cases in which there has been an attempt to apply this rule in courts of equity, but without avail. The class of cases to which we refer is that in which there has been an attempt to drag in the misconduct of one of the parties, relating to third persons, who have no interest in the subject-matter of the particular controversy between the parties litigant. The rule as laid down in Pomeroy's Equitable Jurisprudence, sec. 399, Vol. 1, is as follows: "When a court of equity is appealed to for relief it will not go outside the subject-matter of the controversy and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands." In section 400 *Id.* the author further says that the principle, he who comes into a court of equity must come with clean hands, under some circumstances, is regulated by the principle, "he who seeks equity must do equity." With this suggestion in view there need be but little trouble to see the boundaries of the exceptions to the general rule.

The case of Trice v. Comstock, 121 Fed. Rep. 620, 61 L. R. A. 176, is a case where parties sought a court of equity to have certain lands which their agent had, in violation of his office, taken in his own name, held in trust by him for them. In his defense the agent contended that the complainants were entitled to no remedy in equity because they had been guilty of iniquity; that their plan of obtaining from the owners options to purchase their lands at fixed prices, of then selling at an advance and retaining the profits, and of obtaining agreements from owners that they might sell the lands at a price above that fixed in the contracts, and retain the balance for their compensation, was reprehensible, and that they conspired with Bowling to induce Greene to sell their lands at a low price. Judge Sanborn said: "There are two sufficient answers to these arguments. (1) That the record shows nothing unfair or inequitable in the plans or acts of the complainants, and (2) that the acts to which the defendants object, neither conditioned nor affected the equity which the complainants now seek to enforce. * * * Moreover, if the charges which the defendants make against the complainants were true, they would constitute no defense to this suit. Their alleged offenses were not against the defendants, but against the former owners of this property. These owners have made no complaint and their rights and remedies are not in question. The only issue here is whether or not the constructive trust which the betrayal of confidence by the agent Comstock has raised shall be enforced. General iniquitous and reprehensible conduct towards third parties do not deprive a suitor of his right to justice in a court of equity. Wrongful conduct in the very act or matter which constitutes the plaintiff's ground of action will repel from a court of equity on the ground that he who seeks equity must do so with clean hands. This rule does not disqualify any complainant from obtaining relief who has not dealt unjustly in the very transaction concerning which he complains." Again in Shaver v. Heller & Merz Co., 48 C. C. A. 61, Judge Sanborn says: "The principle that 'he who comes into equity must do so with clean hands,' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues."

In the case of Tyler v. Tyler, 126 Ill. 525, where a husband, "in anticipation of legal steps being taken by his wife for a separate maintenance, made an assignment of certain securities to his son amounting to about $100,000 upon the expressed consideration of $10,000, and the agreement of the son to pay him for and during his natural life, the sum of $5,000 per annum, to be paid semi-annually from date of the writing, it was held tha

the assignment on its face was plainly fraudulent, in that it attempted to secure the use of the property to the father to the exclusion of all others having claims upon him," and that it could not be recovered back from the son. It seems that the husband was about 65 years old and the wife but 35. They had lived but a short time together, when there was a disagreement resulting in separation. Thereupon the husband executed the agreement aforesaid. Evidence was adduced to show that the son had declared that he held the property (which was personal), in trust for his father. The appellate court held a different view of the matter from th supreme court, in an opinion by Judge Moran, 25 Ill. App. 323, 342. Judge Moran, said: "We have already seen that the court will not refuse to enforce such a trust for the reason that the conveyance to the trustee, who has declared the trust, was for the fraudulent purpose of hindering or delaying creditors. The view we have taken in this case is one that the courts have seldom had occasion to announce, because the discussion of trusts connected with conveyances made to defraud creditors have generally related to the secret or constructive trusts, which as a badge of fraud, aids the creditor to avoid the conveyance, and allows the perfidious friend or relation to retain the fruit of the fraud in which he has participated as against his *particeps criminis*. While we do not question the wisdom of this rule, which is firmly established in this state, it must be admitted that it has frequently operated to sustain double fraud. The 'greed of Mammon' which has induced the trusted friend or the favorite son to cruelly abuse and outrage the confidence reposed, and to disappoint the hope by the basest treachery, must, under such a rule, be satiated, and the false friend be allowed to retain the ill-gotten portion. We confess that we apply to the facts of this case with considerable judicial satisfaction, a well-established rule of equity, which will operate to defeat the attempted treachery of this son towards his father."

The point Judge Moran made was that there was evidence that the son had declared that he held the property in trust for his father. Upon the proof of such a declaration it seems to us that the ends of jutices would be far better served by the position taken by Judge Moran, for the evident import of the agreement between the father and son was in effect to allow the full enjoyment of the property if carried out, the open announcement of the trust by the son would have made the discovery of the situation an easy one. We believe that much more latitude should be allowed in the application of the rule than has yet been given it. Equity certainly ought to go to the extent of holding that the relationship of father and son is such an one, in its very nature, as is proper to regard with as much sacredness as that of a trusted agent or attorney in whom the title to property has been placed with the declared intention of defrauding creditors.

NOTES OF IMPORTANT DECISIONS.

STREET RAILROADS — INSTRUCTIONS AS TO RIGHT OF WAY OF STREET RAILROAD ON ITS OWN TRACK.—Trial courts sometimes instruct juries in suits for damages against street railroad companies that the latter have exclusive right to passage over their own track, thus prejudicing at once the case of plaintiff who is injured by being struck by defendant's car while on the track in front of said car. That such an instruction is error is clearly shown by the decision of the Court of Appeals of Kentucky in the recent case of Palmer Transfer Co. v. Paducah Railway & Light Co., 89 S. W. Rep. 515. The court in the course of its opinion not only shows the fallacy of an instruction like that adverted to in the preceding paragraph, but also volunteers the framing of a correct instruction which will be welcomed by courts and attorneys as being a very satisfactory and succinct statement of the mutual rights of vehicles and street cars on the letter's right of way. The court said: "The court was in error in advising the jury, as it practically did, that the car had the right to the exclusive use of its track as against other vehicles. In Greene v. Louisville Railway Co., 84 S. W. Rep. 1154, 27 Ky. Law Rep. 316, it was held that the driver of a wagon in a public street has the right to use any part of it, although occupied by the track of a street railway, and if, while driving on the street car track, he is struck by the car without negligence on the part of those in charge of the car, when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he cannot recover; but he is not a trespasser n the track, and has the right to anticipate th a proper lookout would be kept by those in charge of the cars and that ordinary care would be exercised by them to avoid running into him. In lieu of instruction No. 5 the court should have given one to conform to that directed by this court, in

the opinion of the case *supra*, to be given upon a retrial of that case: 'That the plaintiff was lawfully upon the street and had the right to use any part of it, that the defendant was entitled to the use of its tracks for the free passage of its cars, that it was the duty of those in charge of defendant's car to keep a lookout for persons and vehicles upon the track and to exercise ordinary care to discover and avoid injuring them, and that it was the duty of plaintiff in using the street to use ordinary care for his own safety and the safety of others.'"

LIFE INSURANCE—LIABILITY OF COMPANY FOR ACT OF AGENT IN REBATING PREMIUMS ON LIFE INSURANCE POLICY.—Rebating is the most notorious evil of the present day, and its existence in the business of life insurance solicitation has not been the least important of the causes which have produced this unpleasant notoriety. Many states have statutes prohibiting the rebating of premiums on life insurance policies which statutes have experienced a temporary resurrection by reason of the recent insurance investigations in New York. Prosecutions under such statutes, however, will not be encouraged by the decision of the Court of Appeals of Kentucky in the recent case of Equitable Life Assurance Society v. Commonwealth, 89 S. W. Rep. 537, where the court held that under the Kentucky statutes providing that no life insurance company doing business in the state shall make or permit discrimination in favor of individuals between insurants, and that no such company or agent thereof shall allow any rebate of premium, and that every company or agent violating the provisions of the section shall be fined, a company is not so liable for the act of its agent in giving a rebate on a premium, not authorized or assented to by it, but disapproved by it.

To the minds of some will come recollection of other recent cases which have held insurance companies liable for the acts of their agents in the given of rebate. The opinion in the principal case carefully distinguishes these cases by reason of the wording of the different statutes under which these prosecutions have been brought. The court said: "There can be no doubt but the agent (who allowed this rebate) violated this statute, and he could have been punished for it; but the question is, can the appellant, the principal, be held criminally liable for the criminal acts of its agents which it neither approved of nor consented to, but, on the contrary, disapproved of? Counsel for appellee admits the general rule to be that the principal is not liable for the criminal acts of the agent, unless the principal authorizes, approves of, or at least consents to, the act, but claims that the case at bar is an exception to the general rule, and cites Am. & Eng. Enc. of Law (2d Ed.), vol. 22, p. 933, and the cases of Metropolitan Life Ins. Co. v. People (Ill.), 70 N. E. Rep. 634, and Franklin Ins. Co. v. People (Ill.), 66 N. E Rep. 378. We find from reference to the Encyclopædia of Law, *supra*, that the author states that such a statute as ours is valid. The same question was likewise determined in the Illinois cases cited above. The Illinois cases, however, go farther, and expressly decide that the company can be made responsible criminally for the action of its agent in allowing rebates, even if done without the knowledge, approval, or consent of the company.

There is no doubt about the validity of our statute, and that persons violating it can be punished for violating it as provided for therein, and it is clear that the courts of Illinois properly construed the statute of that state upon the subject of rebate and held the insurance company responsible criminally. But, upon an examination of the statute of that state, we find it differs materially from ours in an important particular. in section 3 of that act (Hurd's Rev. St., 1903, p. 1057, § 29) we find the following language: 'Any such life insurance company or association which shall transact its business in this state in violation of the provisions of this act shall, *together* with the agent or agents so unlawfully transacting said business *jointly and severally*, be subject to a penalty of not less than five hundred dollars.' (Italics ours.) The language of our statute is: 'Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined,' etc. It will be noticed that the Illinois statute says that the company, *together* with the agent, shall be fined, while our statute says that the company *or* its officers *or* agent shall be fined. Thus it will be seen that the Legislature of Illinois intended to make the company *and* the agent responsible, while the Legislature of Kentucky did not intend to make them jointly responsible, as evidenced by the use of the disjunctive 'or,' which shows that it was the intention of the Kentucky Legislature that the general doctrine of the criminal responsibility of the principal should apply. In our opinion the action of the lower court was erroneous, because, although a principal is liable civilly, either in an action *ex contractu* or *ex delicto*, for the acts of its agent within the scope of his authority, the principal is not liable criminally for the acts of its agent, even when within the apparent scope of his authority, unless authorized or assented to by the principal or made so by statute."

While we have no complaint to lodge against the correctness of the decision of the Kentucky Court of Appeals we feel that the statute of that state, under such a construction, falls far short of providing the remedy intended by the legislature. The men who pass our laws are usually not so accute as our judicial tribunals in noting the distinctive between disjuntives and conjunctives and therefore fail to properly express their intention in legislation attempting to create a joint liability. Under such a construction as this what would be easier than for a company to prohibit rebating by rule while secretly encouraging the infraction of the rule by irresponsible agents?

THE CONSTITUTIONALITY OF STATE LICENSE LAWS FOR THE PRIVILEGE OF DOING BUSINESS, INVOLVING CLASSIFICATION AND DISCRIMINATION.

Laws exacting a license for the privilege of selling goods or engaging in other kinds of business which attempt a classification of the subjects and objects of such tax are common and have often been passed upon by the courts. In the consideration of such laws various important constitutional questions have been presented. They have been condemned often as attempts to regulate interstate commerce, as abridging the privileges or immunities of citizens of the United States, or denying certain persons the equal protection of the laws, and as discriminating against certain persons.

1. *Classification for Legislative Purposes must be Reasonable.*—Laws must be fair, impartial and uniform in their operation. Where privileges are granted by a law they should be open to the enjoyment of all upon the same terms and conditions.[1] A law cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another.[2] As the regulation must apply to all of a class, it follows that all discriminations in laws against those of the same class are bad.[3] The difference which will support class legislation must be such as in the nature of things furnishes a reasonable basis for separate laws and regulations.[4] The general rule is that, the law will be held valid if it operates equally upon all subjects within the class for which the rule is applied.[5] It must embrace all and exclude none whose conditions and wants render such legislation necessary or appropriate to them as a class.[6]

2. *The Rule as Applied to Proper Police Regulations* is that, where all persons engaged in the business sought to be regulated within the prescribed limits are treated alike and are subject to the same restrictions, the law will be held valid. "The specific regulation for one kind of business," observed Mr. Justice Field, in speaking for the Supreme Court of the United States, "which may be necessary for the protection of the public, can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."[7]

3. *Laws which Discriminate in the License Tax Imposed by Them Against Persons or Products of Other States are Unconstitutional*—First, because such laws constitute an interference with interstate commerce, and, second, because they also are in violation of the privileges and immunities of citizens in other states guaranteed by the federal constitution.

4. *Equal Protection of the Laws — The Rule.*—In speaking of the difficulty of formulating a general rule that would cover all cases of this character, the Supreme Court of the United States has remarked: "What may be regarded as a denial of the equal protection of the law is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringe rights pro-

[1] Chicago v. Rumpff, 45 Ill. 90, 97, 92 Am. Dec. 196; Hudson v. Thorne, 7 Paige (N. Y.), 261.

[2] Tugman v. Chicago, 78 Ill. 405; May v. People, 1 Colo. App. 157, 27 Pac. Rep. 1010.

[3] Reg. v. Flory, 17 Ont. Rep. 715; Reg. v. Johnson, 38 Up. Can. Q. B. 549; *Re* Pirie and Town of Dundas, 29 Up. Can. Q. B. 401.

[4] State v. Loomis, 115 Mo. 307, 314, 33 S. W. Rep. 350.

[5] Nichols v. Walters, 37 Minn. 264.

[6] Yick Wo v. Hopkins, 118 U. S. 256; State v. Ramsey, 48 Minn. 236, 240, 51 N. W. Rep. 112; Johnson v. St. Paul & D. R. R. Co., 43 Minn. 222, 45 N. W. Rep. 156; *In re* Eight Hour Law, 21 Colo. 29, 32, 39 Pac. Rep 328; Covington v. East St. Louis, 78 Ill. 548; Randolp. v. Wood, 49 N. J. Law, 85, 7 Atl. Rep. 286; American Furniture Co. v. Batesville, 139 Ind. 77, 38 N. E. Rep. 408; Low v. Printing Co., 41 Neb. 127, 138, 59 N. W. Rep. 362; Shinkle v. Covington, 83 Ky. 420; State v. Currens, 111 Wis. 431, 87 N. W. Rep. 561.

[7] Soon Hing v. Crowley, 113 U. S. 703, 708, 709; *In re* Tie Loy, 26 Fed. Rep. 611; State v. French, 17 Mont 54, 30 L. R. A. 415, 41 Pac. Rep. 1078.

tected by the national constitution. No rule can be formulated that will cover every case."[8]

This court has often stated the general rule, from time to time, in various forms: "The equal protection of the laws is a pledge of the protection of equal laws."[9] The guarantee means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances."[10] The constitutional amendment requires that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed."[11] Due process of law and the equal protection of the laws are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."[12] The provision "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country, for the protection of their persons or property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."[13] Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection."[14]

5. *Same—The Decisions.*— The Supreme Court of the United States declared unconstitutional a statute of Illinois directed against illegal combinations or so-called trusts which excepts those relating to "agricultural products or live stock while in the hands of the producer or raiser." The court, per Mr. Justice Harlan, condemned the law as follows: "In prescribing regulations for the conduct of trade it (the legislature) cannot divide those engaged in trade into classes, and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same thing with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular cases within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate execution of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws

[8] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 558.
[9] Yick Wo v. Hopkins, 118 U. S. 356, 369.
[10] Missouri v. Lewis, 101 U. S. 22, 31.
[11] Hayes v. Missouri, 120 U. S. 68, 81.
[12] Duncan v. Missouri, 152 U. S. 377, 382.
[13] Barbier v. Connolly, 113 U. S. 27, 31.
[14] G. C. & S. F. Ry. v. Ellis, 165 U. S. 159, 155, 160, 165; Cotting v. Kansas City Stock Yards Co., 183 Mo. 79, approving above statement.

to those against whom it discriminates."[15] Recently the Supreme Court of Arkansas declared unconstitutional a license statute of that state which discriminated in favor of resident county merchants. The law in question required "any person, either as owner, manufacturer or agent" who "shall travel over or through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage, and vehicle, or either of said articles," to obtain a license from the county clerk, and provided that "nothing in this act shall apply to any resident merchant in said county."[16] Laws of this character are uniformly held unconstitutional.[17] Hence, an ordinance requiring a hawker or peddler who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which the city is situated, to procure a license, discriminates against the citizens and products of other communities, and is unconstitutional.[18] Likewise is a law unconstitutional which authorizes the withholding of a peddler's license from citizens of other states,[19] or which discriminates between residents and nonresidents.[20] The Supreme Court of Pennsylvania rightly held void an ordinance which prohibited nonresidents from peddling or selling goods from house to house without a license, and which fixed such license tax at such sum as, in effect, to make it prohibitory, and which in terms, excepted residents of the municipality from its operation.[21] The adjudicated cases show various laws of this character wherein many attempts have been made to evade indirectly these constitutional provisions, but in almost every instance the courts unhesitatingly pronounce them unconstitutional.[22]

6. *License Laws Interfering with or Attempting to Regulate Foreign or Interstate Commerce.*—State laws and municipal ordinances of the character under consideration are uniformly declared unconstitutional where they interfere with or attempt to regulate interstate or foreign commerce, since, under the federal constitution, the congress possesses exclusive jurisdiction "to regulate commerce with foreign nations and among the several states."[23] This subject was fully considered by the supreme court of the United States in Robbins v. Shelby Taxing District,[24] wherein a state law of Tennessee was held unconstitutional which imposed a license tax on "all drummers and all persons not having a regular licensed house of business in the taxing district," who should offer for sale or sell goods, wares or merchandise therein by sample. This court has since rigidly adhered to the rule of this case.[25] Discrimination is not the test for the determination of the unconstitutionality of such laws when the commerce clause of the federal constitution is involved. Notwithstanding the

[15] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 63, distinguishing Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, and American Sugar Refining Co. v. Louisiana, 179 U. S. 89. To same effect M. K. & T. Ry. v. Haber, 169 U. S. 613, 626; Sinnott v. Davenport, 22 How.(U. S.) 227, 243; Gibbons v.Ogden, 9 Wheat.(U. S.) 1, 210.

[16] *Ex parte* Deeds, 87 S. W. Rep. 1030.

[17] Robbins v. Shelby Taxing District, 120 U. S. 489; Tiernan v. Rinker, 102 U. S. 123; Guy v. Baltimore, 100 U. S. 434; Welton v. Missouri, 91 U. S. 275; Vines v. State, 67 Ala. 73; Boldt v. State, 60 Ark. 600, 31 S. W. Rep. 460; Galloway v. State, 60 Ark. 362, 30 S. W. Rep. 349; State v. Deschamp, 53 Ark. 490, 14 S. W. Rep. 653; State v. Marsh, 37 Ark. 356; State v. McGinnis, 37 Ark. 362; *Ex parte* Thomas, 71 Cal. 204, 12 Pac. Rep. 53; State v. Zophy, 14 S. Dak. 119, 84 N. W. Rep. 391.

[18] Grafty v. Rushville, 107 Ind. 502, 8 N. E. Rep. 609; Rodgers v. McCoy, 6 Dak. 238, 44 N. W. Rep. 990.

[19] Bliss' Petition, 63 N. H. 135.

[20] Robbins v. Shelby Taxing District, 120 U. S. 489; Nashville v. Althorp, 5 Cold. (Tenn.) 554; Jonas v. Gilbert, 6 Sup. Ct. of Can. 356; Lucas v. Macomb, 49 Ill. App. 60; Gould v. Atlanta, 55 Ga. 678; Saginaw v. Circuit Court Judges, 106 Mich. 32, 63 N. W. Rep. 985; St. Louis v. Consolidated Coal Co., 113 Mo. 83, 20 S. W. Rep. 699; Shamokin v. Flanigan, 156 Pa. 43 26 Atl. Rep. 780; Clements v. Casper, 4 Wyo. 494, 35 Pac. Rep. 472.

[21] Sayre Borough v. Phillips, 148 Pa. St. 482, 33 Am. St. Rep. 842, 16 L. R. A. 49, 24 Atl. Rep. 76.

[22] Buffalo v. Reavey, 55 N. Y. Supp. 792; State v. Stevenson, 109 N. Car. 730, 14 S. E. Rep. 385; Georgia Packing Co. v. Macon, 60 Fed. Rep. 774; Albertson v. Wallace, 81 N. Car. 479; Sinclair v. State, 69 N. Car. 47; Commonwealth v. Snyder, 182 Pa. St. 630, 38 Atl. Rep. 356; Rodgers v. Kent Circuit Judge, 115 Mich. 441, 73 N. W. Rep. 381; Marshalltown v. Blum, 58 Iowa, 184, 12 N. W. Rep. 266; Cullman v. Arndt, 125 Ala. 581, 28 So. Rep. 70; Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. Rep. 857; State v. Mallory (Ark.), 67 L. R. A. 773; Hayden v. Noyes, 5 Conn. 391; Willard v. Killingworth, 8 Conn. 247; *Ex parte* Camp (Wash.), 80 Pac. Rep. 547; State v. Wagener, 69 Minn. 206, 65 Am. St. Rep. 565, 38 L. R. A. 677, 72 N.W. Rep. 67.

[23] Const. U. S., art. I, sec. 8, p. 3.

[24] 120 U. S. 489.

[25] Caldwell v. North Carolina, 187 U. S. 622; Brennan v. Titusville, 153 U. S. 289; Crutcher v. Kentucky, 141 U. S. 47; Lyng v. Michigan, 135 U. S. 161; Stoutenburgh v. Hennick, 129 U. S. 141; Asher v. Texas, 128 U. S. 129.

law may be made applicable to all of the classes to which it applies, it will be held unconstitutional because interstate commerce cannot be taxed at all.[26] But laws of this character which operate uniformly upon all persons engaged in the same kind of business, whether residents or non-residents of the states, are valid where the goods sold are at the time of the sale within the state and have become a part of the property of the state.[27] The rule has been applied often to peddlers, hawkers, commercial travelers or drummers and itinerent venders.[28]

7. *License Imposed on Foreign Corporations and Insurance Agents.*—The law confines the exemption strictly to such persons as ars engaged, and to such property as is employed in interstate or foreign commerce. The term commerce, as used in the federal constitution, has been held often not to include personal contracts, although made between citizens of different states, as those made by street brokers and insurance contracts.[29] So it has been held that a corporation is not a citizen within the meaning of this clause of the federal constitution.[30] Hence, a state may impose such conditions upon foreign corporations as it may choose, as a condition of their privilege to do business within the state.[31] However, a state cannot by means of a license tax exclude from its territory a foreign corporation engaged in interstate commerce.[32]

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[26] State Freight Case, 15 Wall. (U. S.) 232; Robbins v. Shelby Taxing District, 120 U. S. 489, 497.

[27] Emert v. Missouri, 56 U. S. 296; Brown v. Houston, 114 U. S. 622; South Bend v. Martin, 142 Ind. 31, 41 N. E. Rep. 315; Walton v. Augusta, 104 Ga. 757, 30 S. E. Rep. 964, distinguishing Leloup v. Port of Mobile, 127 U. S. 640.

[28] Hynes v. Briggs, 41 Fed. Rep. 468; Machine v. Gage, 100 U. S. 676; Commonwealth v. Harmel, 166 Pa. St. 889, 30 Atl. Rep. 1036; *Exparte* Butin, 28 Tex. App. 304, 13 S. W. Rep. 10.

[29] New York Life Insurance Co. v. Cravens, 178 U. S. 389, 401, 20 Sup. Ct. Rep. 962, 44 L. Ed. 1116; Hooper v. California, 155 U. S. 648; Paul v. Virginia, 8 Wall. (U. S.) 168, 185, 19 L. Ed. 357; Philadelphia Fire Assn. v. New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108, 30 L. Ed. 342; People v. Thurber, 13 Ill. 554; Walton v. Augusta, 104 Ga. 757, 30 S. E. Rep, 964.

[30] Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. Ed. 432; McCready v. Virginia, 94 U. S. 391; United States v. Cruikshank, 92 U. S. 542; Commonwealth v. Gregory (Ct. of App. Ky.), 89 S. W. Rep. 168.

[31] Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Pennsylvania Fire Assn. v. New York, 119 U. S. 110; Maine v. Grand Trunk Ry. Co., 142 U. S. 217; Osborne v. Florida, 164 U. S. 650.

[32] Norfolk Railroad Co. v. Pennsylvania, 136 U. S. 114.

CONSTITUTIONAL LAW—SEIZURE AND SALE OF ILLEGAL FISH NETS—DUE PROCESS OF LAW.

DANIELS v. HOMER.

Supreme Court of North Carolina, October 17, 1905.

Acts Gen. Assem. 1905, ch. 292, regulates fishing in Albemarle and Pamlico Sounds and waters connected therewith, and creates a close season. Section 8, p. 330, declares that a person violating the act shall be guilty of a misdemeanor, and on conviction may be fined and imprisoned; and section 9, p. 331, makes it the duty of certain officers, on an informant's affidavit that nets are being maintained in violation of the act, to investigate the same and seize and remove the goods or other appliances used in violation of the act, and sell the same and apply the proceeds to the payment of costs and expenses of removal, and pay any balance remaining to the school fund of the county nearest to where the offense is committed. Held that, as a person whose nets are seized for alleged violation of the act is entitled to contest such question, either in replevin to recover the nets, by an injunction to prevent a sale, or by an action to recover the proceeds of the sale and damages, section 9 was not unconstitutional, as depriving him of his property without due process of law.

CLARK, C. J.: The General Assembly of 1905 enacted chapter 292 "to regulate fishing in Albemarle and Pamlico Sounds and waters connected with them." The first five sections of that chapter define and regulate the manner of fishing in various sections of the sounds. Section 6 (marked 5 in the printed act) is as follows: "That it shall be unlawful for any person to set or fish any net or appliance of any kind for catching fish within one mile on north or south side of a line five miles long, running west from center of New Inlet or Oregon Inlet, or on north or south side of a line five miles long, running northwest from center of Hatteras Inlet." Section 7 makes the act operative only from January 15th to May 15th in each year—a "close" season of four months. We were told on the argument, and it was not converted, besides it is matter of common knowledge, that no small part of the sustenance and business interest of the people living adjacent to Albemarle and Pamlico Sounds and the waters connected therewith are dependent upon catching fish, whose supply has so greatly decreased that the United States government has established and is operating at large expense a fish hatchery at Edenton for the purpose of putting into the waters of Albemarle Sound millions of young shad and other fish each year to replenish the diminishing supply, and that the habit of the fish is to go out to sea, and at the end of three years

they return to the waters where they are liberated for the purpose of spawning, and that, if nets are set across the inlets through which they return, the fish are either caught or detained beyond the spawning season and the supply of fish in Albemarle and Pamlico Sounds and connecting waters will be thereby almost entirely destroyed, and the government hatchery at Edenton will become a useless expense, and will doubtless be abandoned.

With a view of protecting the rights of the public against the cupidity of those who for their own profit would "kill the goose that lays the golden egg" for the benefit of a whole section of the state, whose people are so largely interested in the fish industry, the General Assembly of 1905 enacted the above-named chapter, creating a close season of four months, during which the fish may freely return to our waters to lay their eggs, and for the purpose of enforcing its execution, when the profits arising from its violation would be a great temptation thereto, deemed it necessary to enact sections 8 and 9 of said act as follows: "Sec. 8. That any person who shall violate any section or provision of this act shall be guilty of a misdemeanor and upon conviction in any county opposite the place at which said act is done shall be fined or imprisoned at the discretion of the court." And inasmuch as, pending trial and conviction, the destruction of the fish would go on, to the great profit of the violators and to the irreparable injury of the public, the General Assembly thought proper to add to the abatement of the nuisance the penalty of the loss of the nets, the means by which the law was violated, by the following: "Sec. 9. That it shall be the duty of the oyster commissioner or assistant oyster commissioner, whenever an affidavit is delivered to him, stating that affiant is informed and believes that said act is being violated at any particular place, to go himself or send a deputy to such place, investigate the same and they shall seize and remove all nets or other appliances setting or being used in violation of this act, sell the same at public auction and apply proceeds of sale to payment of cost and expenses of such removal, and pay any balance remaining to the school fund of county nearest to where offense is committed." An affidavit by 14 citizens having been made March 25, 1905, that B. T. Daniels was violating the aforesaid act by setting two nets in the waters of Pamlico Sound at the end of Croatan Sound, and also east of Roanoke Marshes Lighthouse, where the fish, returning to the sound through Hatteras Inlet, would be caught during the "close" season provided by law, the defendant, the assistant oyster commissioner, notified said Daniels that he would seize said nets on May 1st, which nets were in water where the aforesaid law prohibited the setting or fishing said nets, as the plaintiff admits, and against the protest of said Daniels did take said nets out of the water and placed them on shore under guard, whereupon this proceeding for claim and delivery for the nets was instituted. The defendant avowed his purpose to sell the said nets and apply the proceeds to the cost of seizing and removing the same, and applying the surplus of the proceeds, if any, to the school fund of the county as provided by said act. There is no individual or property right to fishery in the waters mentioned in the act. The right of fishery, as well as hunting, rests in the state, and is subject absolutely to such regulations as the General Assembly may prescribe, and can be exercised only at such times and by such methods as it may see fit to permit (Hetterick v. Page, 82 N. Car. 65; Rea v. Hampton, 101 N. Car. 51, 7 S. E. Rep. 649; State v. Gallop, 126 N. Car. 979, 983, 35 S. E. Rep. 180, and cases there cited); and this right may be exercised a marine league out to sea (Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. Rep. 559, 35 L. Ed. 159), and citizens of other states may be excluded (McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248). As the plaintiff admits his nets were set in waters forbidden by the act, his counsel admitted that the seizure was legal, but denied the right of the defendant to sell the nets as provided in the statute. But the state was sole judge of the penalty it should impose for a violation of its laws. It thought proper here to make the loss of the instruments used in such violation a part of the penalty, possibly to prevent a repetition of the offense, or as a surer deterrent of its commission.

The plaintiff contends that, though his property is admitted by him to have been used in violation of law at the time of seizure, the statute imposing as a penalty the loss of such property is unconstitutional, in that there was no previous notice and trial. But, as the General Assembly could prescribe the loss of the nets as a penalty and the offense is admitted, there is nothing to try. As was said in Rea v. Hampton, 101 N. Car. at page 55, 7 S. E. Rep., at page 651, 9 Am. St. Rep. 21: "As the legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no right to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the law to protect them in its violation." In Rose v. Hardie, 98 N. Car. 44, 4 S. E. Rep. 41, a town ordinance was held valid which authorized all hogs running at large to be impounded and sold for the cost and penalty. Here the state made the penalty the forfeiture of the article used in violation of the act. In Mowery v. Salisbury, 82 N. Car. 175, a town ordinance was sustained which made the penalty for failure to pay the tax on a dog the right to kill the dog. At common law any personal chattel that, even accidentally, caused the death of a rational being was forfeited to the sovereign and sold, and the proceeds distributed to the poor, as a cart that ran over a person, a weapon, and the like. They were styled "deodands." 1 Blk. Com. 300. And

no trial or conviction of any person was necessary. But the plaintiff contends that he might not have been using his nets in forbidden water, and, if so, he was entitled to have that question determined by a jury trial before his nets were sold. As the plaintiff admits that his nets were so being used on this occasion, the proposition becomes a mere academic question in this case. In view, however, of the importance of the matter being settled, and the accordance with the wishes of the parties, we pass upon the point. It was not seriously controverted, and could not be, that an abatement of a nuisance must be summary, and that a seizure can take place before any adjudication by legal process; the party having his remedy by proper proceedings for an illegal seizure. In Hettrick v. Page, 82 N. Car. 65, Smith, C. J., held that fishing in waters, when prohibited by law was a public nuisance, and even a private individual, if injured thereby, or, indeed, anyone else, may remove the impediment. But the plaintiff insists that before his nets are sold he is entitled to have the fact determined by a court whether he has incurred the penalty by doing the illegal act. So he has; but it can be asserted in this very action to recover the nets before sale or after sale by an action to recover the proceeds of sale or damages, or upon advertisement of sale by an injunction to prevent the sale. He has his full remedy, but it does not include a continuance of the nuisance to his individual profit and the public detriment, while the question of violation of the statute is being determined. The identical point has been determined, and by courts of the highest authority. By a statute in New York, very similar to ours, passed in 1880, fishing at certain places was prohibited and made punishable as a misdemeanor. This not proving sufficiently effective, an amendment in 1883 authorized any person to "abate and summarily destroy," and it was made the duty of any game constable to "seize, and remove and forthwith destroy," any "net, pound or other means or device for taking or capturing fish" in violation of any law, then or thereafter enacted, for the protection of fish. In the Court of Appeals of New York (Lawton v. Steele, 119 N. Y. 226, 23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813), the act was held constitutional, affirming the court at General Term. Upon writ of error to the United States Supreme Court this was again affirmed (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. Ed. 385); the court holding that the authority to summarily destroy nets used in violation of the law for the protection of fish "is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law." After stating the absolute power of the Legislature to regulate fishing and to provide for the protection of fish, the court says: "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officers seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. A was said by the Supreme Court of New Jersey in a similar case (Am. Print Works v. Lawrence, 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore necessary unconstitutional.' Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.' This decision by the court, charged as the final tribunal with the construction and enforcement of the fourteenth amendment, should be conclusive. The United States Supreme Court (152 U. S. 142, 14 Sup. Ct. Rep. 503, 38 L. Ed. 385) further says: "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This, however, is by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. * * * The power of the Legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (People v. West, 106 N. Y. 293, 12 N. E. Rep. 610, 60 Am. Rep. 452), and in such case the Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance." It further cites to same purport Weller v. Snover, 42 N. J. Law, 341, and Williams v. Blackwell, 2 H. & C. 33, which sustained acts for the summary destruction of fish baskets and traps used to catch fish contrary to law. Lawton v. Steele has since cited for this proposition as authority by a unanimous court, Sentell v. Railroad, 166 U. S. 705, 17 Sup. Ct. Rep. 693, 41 L. Ed. 1169.

Code, §§ 1049, 1051, 1052, authorize any police officer, constable, sheriff, or justice of the peace to summarily destroy any gaming table, etc., and the seizure of any money staked (which is not a nuisance *per se*, any more than the fishing net), one half to belong to the person seizing it and the other half to the poor of the county. This is cited by Dick, J., in North Carolina v. Vanderford (C. C.), 35 Fed. Rep. 286, in sustaining the summary seizure and destruction of a barrel of "blockade" whisky. And a similar statute was held constitutional in Garland v. State, 71 Ark. 138, 71 S. W. Rep. 258. Certainly gambling in the back room of some village hotel, or private house, or stable loft is not as injurious as the destruction of the fishing industry, upon which depends to a large extent the prosperity of twenty counties, and whose importance has attracted

the attention of the federal government and caused a large expenditure to restore the depleted stock of fish—an expenditure which would be in vain if the General Assembly is powerless to authorize the prompt abatement of fishing nets at the inlets during the months when the fish return to lay their eggs, or to authorize such penalties, including the forfeiture of the nets illegally used, as the representatives of the people may deem necessary to suppress the nuisance. The same ruling as in Lawton v. Steele, *supra*, was made in Wisconsin, in a very able opinion by Cassoday, C. J. (1896), Bittenhaus v. Johnston (1896), 66 N. W. Rep. 805, 32 L. R. A. 380. Lawton v. Steele has been recently quoted and followed. Burroughs v. Eastman, 101 Mich. 426, 59 N. W. Rep. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419; Osborn v. Charlevoix, 114 Mich. 655, 72 N. W. Rep. 982. The plaintiff relies on Colon v. Lisk, 153 N. Y. 188, 42 N. E. Rep. 302, 60 Am. St. Rep. 609, but that case fully recognizes and follows Lawton v. Steele, originally decided by the same court, and merely holds that an extension of the same summary power to the seizure and sale of vessels was not necessitated by the same urgency as was requisite as to nets in the water, and that there should be condemnation proceedings before sale. Presumably it were better, as to articles of that value and nature, that the right to sell should be adjudicated before sale. As to the nets, the plaintiff, had he not admitted his violation of law, could have contested the nets having been set within the forbidden limits, or that they had been so used with his consent, or set up any other defense, without detriment to his rights by this proceeding of claim and delivery, or by an injunction to prevent a sale, or by action to recover the proceeds of sale and damages. On the other hand, the General Assembly had the power to authorize prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law, by this or any other of the remedies just enumerated. As against the person actually creating the nuisance, it may be abated without notice. Jones v. Williams, 11 M. & W. 176; Garret on Nuisances, 314. Such is the law, recognized even as far as India. Ratanlal & Dharajlal, Eng. & Indian Law of Torts, 403. Besides, in this case, notice was actually given before removing the nets, and the plaintiff neither removed nor offered to remove his nets from the forbidden waters, though given the opportunity to do so by the notice given him by the defendant. The plaintiff has had his day in court by this very proceeding in claim and delivery, and the nets are not yet sold. It is no deprivation of any right that he is the actor, the plaintiff, since (as the United States Supreme Court said in Lawton v. Steele, *supra*) the burden is on the defendant to justify the seizure. It is not a question of right, but merely as to the form of legal procedure, whether the violator of the statute shall be plaintiff or defendant in the action, and as to that surely the Legislature is the judge. As was said in State v. Lytle, 138 N. Car. 741, 51 S.E. Rep. 68, "a statute will never be held unconstitutional if there is any reasonable doubt;" citing Sutton v. Phillips, 116 N. Car. 504, 21 S. E. Rep. 698. Can we say that an act is unconstitutional "beyond a reasonable doubt," when such legislation has been held constitutional by the Supreme Court of the United States and by the highest courts of New York, New Jersey, and Wisconsin? If the nets cannot be forfeited, then, by having two sets of nets, the plaintiff can replace his nets as fast as the officer carries the other off, and then, in turn, put in the first net when the second is seized. Thus the attempt to abate the nuisance would become a mere farcical race between the violator and the officer of the law. There is no analogy between the prompt seizure of property, when required by reasons of public policy, when the rightfulness of such seizure can be afterwards mitigated, and, if wrongfully taken, the article can be recovered or damages therefor, and the taking of human life, which cannot be restored. In the exercise of the police power the General Assembly is not restricted to indictment, but may proceed by the summary process of abatement of the nuisance and imposing as a penalty the forfeiture or destruction, as it may deem best, of the article illegally used. An act of the Legislature, which speaks for the people in making its laws, is "the law of the land," unless there is a provision of the Constitution which forbids it to enact such law. We look in vain in that instrument for any provision which forbids legislation in furtherance of the police power, authorizing summary process of seizure of nets and their forfeiture when used in open violation of law. The right of seizure and destruction of the nets is not seriously denied. For a stronger reason, then, the alleged violator of the law cannot complain of the "sale at public auction," as that presupposes advertisement and delay, during which time he can, as was done in this case, bring claim and delivery and recover the nets, if not used illegally, whereas, if summarily destroyed, his sole remedy is an action for damages. He is in better case than if the nets were destroyed. In either event, if he is proven to have used the nets illegally, he loses the nets, and it can make no difference to him whether they are destroyed or sold. The state is not compelled to commit an act of vandalism to be constitutional. It has found the criminal law an inefficient protection, and that deprivation of the nets is necessary to prevent the violation of the law. The owner of the nets has his day in court to contest the fact of violation by an action for damages, if nets are summarily destroyed, and the additional remedy of claim and delivery, if to be sold at public auction. He has nothing to complain of. Our steady increase in population renders imperatively necessary the strict enforcement of all measures intended to protect or prevent interference with

the sources of food supply for our people. Th sovereign people of the state are in a bad case if they cannot protect the great fishing industry by providing that those who would destroy it by nets set at forbidden and vital places, during the four months prescribed, shall forfeit their nets. The General Assembly has found, and so says by its statute, that this remedy is necessary to enforce the execution of the law. Unless this is done, the state is in fact utterly powerless to protect that large part of its people who are engaged in or dependent upon the great fish industry in its sounds and along its rivers, and the lawless element who disregard the law forbidding setting of nets is exempt from control. The constitution not having forbidden the Legislature to provide for the destruction, or forfeiture and sale, as it may deem best, of nets illegally used, and the owner of the nets having his day in court, either by an action of damages or claim and delivery, this court has no supervisory power to hold that either the destruction of the nets or their forfeiture and sale is the remedy which the Legislature must provide. That is a matter for its judgment. It may prescribe either remedy or both and change it by subsequent enactment. The owner, if violating the law, has suffered a just punishment. If not violating it, he has his full remedy in court to recover the nets or damages as he may elect. In the same way the state takes property under the right of eminent domain and turns it over to a railroad corporation, which pays for it afterwards. And this is for the same reason that, if litigation must be had and terminated before the taking, it would seriously impair the benefit intended by the exercise of the powers of the state for the greatest good to the greatest number. For the same reason, the United States statutes for the enforcement of the internal revenue (sections 3455, 3457, U. S. Comp. St. 1901, pp. 2279, 2281) forfeit articles not lawfully stamped, or stills, etc., illegally used, and direct them to be sold and the proceeds paid into the federal treasury, unless before sale the owner shall proceed, as here, by action to recover the articles on the allegation that there was no illegal user. There are other United States and state statutes imposing forfeitures. Section 3460, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2282), provides that, where the value of the property seized is less than $500, the property shall be advertised and sold and the proceeds paid into the treasury, unless the owner, as in this case, comes in and by action asserts his rights. Conway v. Stannard, 84 U. S. 404, 21 L. Ed. 649; Pilcher v. Faircloth, 135 Ala. 314, 33 So. Rep. 545. Where the amount is over $500, the government, after seizure, begins regular condemnation proceedings (21 Am. & Eng. Enc., 2d Ed., 931, note 12); but the authorities all hold that this is only necessary because the statute requires it, and that, when the condemnation is decreed, it relates back to the date of the offense (The Mary Celeste, 2 Lowell, 354, Fed. Cas. No. 9,202; Henderson's Case, 81 U. S. 44, 20 L. Ed. 815; North Carolina v. Vanderford, *supra*), as the forfeiture accrued then, and the title passed to the government at that instant.

Such laws are not to be construed strictly, but reasonably, so as to carry out the intention of the Legislature. United States v. Stowell, 133 U. S. 12, 10 Sup. Ct. Rep. 1044, 33 L. Ed. 555. As is pointed out in United States v. 56 Barrels of Whisky, 25 Fed. Cas. 1075, Fed. Cas. No. 15,095, there is a clear distinction between forfeiture of goods at common law in cases of treason and felony, which could take place only after conviction, and a statutory forfeiture of property because of its use for illegal purposes. In the latter case the offender is not on trial nor before the court, unless he voluntarily comes in as a plaintiff to recover the goods. The statute, says the court, does not make the forfeiture the consequence of his conviction, but of his offense, which is inquired into by a seizure of the property while being illegally used, and proceedings of condemnation, if required by statute, and, if not, then by its destruction or sale, unless the owner seeks an inquiry by claim and delivery or action for damages. As was well said in Weimer v. Bunbury, 30 Mich. 211, there is nothing in the Constitution "that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." Then, after instancing the arrest of a felon, *flagrante delicto*, without warrant (4 Blk. Com. 292), and a traveler passing over the adjacent field when a public road becomes impassable, it is further said: "Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations and surveys. It may be said that in none of these cases is the deprivation final or permanent; but that is immaterial. The Constitution is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial proceedings. 1 Blk. Com. 297." Then, after mentioning statutes to the same effect, by which "the owner of stray beasts might be deprived of his ownership by *ex parte* proceedings not of a judicial character," and the abatement of nuisances by any one injured, who thus becomes "his own avenger or ministers redress to himself (3 Blk. Com. 5)," and distress without warranty (3 Blk. Com. 6), and levy and sale for taxes without judicial decree, it is said that the destruction of a nuisance by a private party "is as lawful as if it had been, preceded by a judgment of a competent court

the only difference being that the party, when called upon to justify the act, must in the one case prove the facts warranting it, while in the other he would be protected by the judgment." This applies in the present case, where the violator of law is deprived of his net, *flagrante delicto*, but has his remedy in this action against the officer for the property, if unlawfully taken. The Supreme Court of the United States (United States v. 1,960 Bags of Coffee, 12 U. S. (8 Cranch) 404, 3 L. Ed. 602) says in this connection: "In the eternal struggle that exists between the avarice, enterprise, and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the Legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation. In this instance we think that the commission of the offense makes the point of time on which the statutory transfer of right takes place."

NOTE.—*Under What Circumstances Property May be Seized and Sold by the state without Due Process of Law.*—The question of what constitutes "due process of law" under the constitutions of the United States and the states, is one upon which the border lines are frequently reached with the resultant differences of opinion. Two able dissenting opinions are filed in the above cause. All the opinions reflect credit on the North Carolina Supreme Court. They show that court not to be a "one judge court." The key note to the dissenting opinions is found in the following from Mr. Justice Connor's opinion: "The public welfare demands the punishment of crime as a means of prevention, but the same public welfare demands that trial by due process of law and conviction shall precede punishment. When such limitations are not imposed, it is found that the grim tradition is true:

> 'I oft have heard of Lyford Law,
> How in the morn they hang and draw
> And sit in judgment after.'"

There is no disposition on the part of the dissenting judges to differ with the opinion of the court in respect to the right of the legislature to prescribe regulations regarding the time, manner and means of fishing, etc., in such waters, including the power to prohibit the placing of the nets, traps, etc., in such portion thereof as it may deem proper for the protection of the rights of the public. The right of the legislature to declare "such nets, etc., as are prohibited, or all nets at certain places or fixed periods, public nuisances, and provide for the summary abatement by removal thereof," is not questioned. Cooper J., says: "As early as 1787, and among the earliest opinions ever filed by our judges, it was held in Bayard v. Singleton, 1 N. Car. 5, that by the constitution every citizen had undoubtedly a right to a decision of his property by a trial jury; for that, if the legislature could take away this right and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without the formality of any trial at all." In Hamilton v. Adams, 6 N. Car. 161, Hall, J., says: "It is a principle never to be lost sight of that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the constitution. Hence it is that no court will give judgment against any person unless such person have opportunity of showing cause against it. A judgment entered up otherwise would be a nullity." Daniel, J., in Robinson v. Barfield, 6 N. Car. 391, 420, says: "The transfer of property of one individual, who is the owner, to another individual, is a judicial not a legislative act. When the legislature presumes to touch private property, for any other than public purposes, and then only in case of necessity and rendering full compensation, it will behoove the judiciary to check its eccentric course by refusing to give any effect to such acts. * * * Our oaths forbid us to execute them, as they infringe the principles of the constitution." Ruffin, C. J., in Hoke v. Henderson, 15 N. Car. 15, 25 Am. Dec. 677, said: "But to inflict after finding default is to adjudge; and to do it without default is equally so, and still more indefensible. The legislature cannot act in that character, and therefore, although this act has the forms of law, it is not one of those laws of the land by which alone a freeman can be deprived of his property. Those terms 'the law of the land' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. * * * In reference to the infliction of punishments and divesting of the rights of property it has been repeatedly held in this state, and it is believed in every other of the union, that there are limitations upon the legislative power, notwithstanding those words that the clause itself means that such legislative acts as profess in themselves directly to punish persons or deprive the citizen of his property without trial before the judicial tribunals and a decision of a matter of right, as determined by the laws under which it was vested according to the course made and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." This dissenting opinion then goes on to say that, "while the opinions filed do not seriously controvert these elementary principles, they hold that the plaintiff has no right to invoke them in this case and can claim no protection by virtue of them; that as to him they are pure abstractions, for that he and his nets are outlawed by legislative enactment. This holding is based upon the following propositions: 1. That the legislature in the exercise of the police power may authorize the abatement of a public nuisance, and, if necessary to that end, direct the destruction of the offending property. 2. That the right to destroy includes the right to condemn and sell by summary action, without notice or judgment of forfeiture and condemnation. 3. That such summary forfeiture and condemnation may be enforced by a ministerial officer, because it is directed to and operates upon the property and not as a punishment or penalty imposed upon the owner for violation of the law. 4. That if the owner is entitled to a hearing and judicial determination of his rights, he may obtain it by resorting to the courts in any appropriate action, and that he is entitled to demand that due process be provided in the statute." After laying down some of the elementary principles which the learned judge states, "always control in passing upon the constitutionality of statutes," and which may be found in Sharpless v. Mayor, 21 Pa. 147, 59 Am. Dec. 759; State v. Barrett,

138 N. Car. 630, 50 S. E. Rep. 506, he then passes to the following: "The latest work on police power thus states the law: 'When the condition of a thing is such that it is eminently dangerous to the safety, or offensive to the morals of a community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance *per se*. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. Rotting or decaying food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and imminently dangerous structures, are the most conspicuous instances of nuisances *per se*.' Freund on Police Power, sec. 520. There are many cases in our reports restricting this power not necessary to be noticed here, for the double reason that the statute under discussion does not direct the destruction of the nets, nor does it declare them to be public nuisances, either *per se* or when used in violation of its provisions. There is not the slightest suggestion that the nets are, either of themselves or when put into prohibited waters, public nuisances. I attach no great importance to this fact, except to show, as I shall undertake to do, that in cases relied upon to sustain the opinion of the court the property was by its illegal use declared by statute to be a public nuisance. The right to direct the removal of nets in violation of law is sustained in Hetrick v. Page, 82 N. Car. 65, in which Smith, C. J., says that no unnecessary damages must be done to the property removed. Rea v. Hampton, 101 N. Car. 51, 7 S. E. Rep. 649, 9 Am. St. Rep. 21. No case can be found in our reports authorizing the destruction of nets. I might safely concede the right of the legislature to direct their destruction by way of abating the nuisance, but I do not find any evidence in the record that such destruction was reasonably necessary. It has been claimed that the right to destroy has been settled by the courts and from this right the power to sell without due process of law is said to follow." The first point made in this able opinion may be best shown by the quotation therein from the dissenting opinion in the case of Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 449, 38 L. Ed. 385: "Fishing nets are in themselves articles of property entitled to protection of the law, and I am unwilling to concede to the legislature of a state the power to declare them public nuisances, even when put to a use in a manner forbidden by the statute, and on that ground to justify their abatement by seizure and destruction, without process, notice, or the observance of any judicial form. * * * It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public fully protected by their detention, the lack of the necessity of the arbitrary proceedings prescribed, seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value, ordinarily affect the principle or tend to show their summary destruction to be reasonably essential to the suppression of their illegal use. Indeed I think the argument is to be depreciated as weakening the importance of the preservation without impairment in ever so slight a degree of constitutional guaranties." It is noted that this dissenting opinion of the chief justice of the United States Supreme Court was concurred in by Justices Field and Brewer, and that Mr. Freund well says "the principles which govern the forfeiture of property were departed from in the decision of the New York Court of Appeals and the Supreme Court of the United States in the case of Lawton v. Steele. * * * The chief argument relied upon, which was the trifling value of the property taken and the disproportionate cost of the condemnation proceeding, is an inadmissible argument when constitutional rights are involved." Other cases cited to support the above were: Weller v. Snover, 42 N. J. Law, 341; American Print Works v. Lawrence, 21 N. J. Law, 248; Bittenhaus v. Johnston (Wis.), 66 N. W. Rep. 805, 32 L. R. A. 380; Burroughs v. Eastman, 101 Mich. 428, 24 L. R. A. 859, 45 Am. St. Rep. 419.

The Right to Declare Property Used in Violation of Law Forfeited.—The court proceeds to discuss the second and third of the above propositions together and shows us that "the right to declare property used in violation of law forfeited and to sell the same is based upon an entirely different principle from the right to destroy. Mr. Freund says: "The power of summary abatement does not extend to property in itself harmless, but which is put to unlawful use or is otherwise kept in a condition contrary to law. * * * The unlawful use may, however, be punished, and the punishment may include a forfeiture of the property used to commit the unlawful act. While in many cases this would be an extreme measure, it is subject to no constitutional restraint, except when the constitution provides that every penalty must be proportionate to the offense. * * * Such forfeiture is not an exercise of the police power but of the judicial power. *i. e.*, the taking of the property does not strictly subserve the public welfare, but is intended as a punishment for an unlawful act. Hence forfeiture requires judicial proceedings—either personal notice to the owner, or at least a proceeding *in rem*, with notice by publication." Sections 525, 526. Mr. Tiedeman (State and Fed. Con. 825), says that a "forfeiture may be declared as a penalty for the infraction of the law. * * * But in all these cases the seizure and destruction must rest upon a judgment of forfeiture procured at the close of the ordinary trial in which the owner of the property has had full opportunity to be heard in defense of his property." Many cases are cited to sustain the above, including: Colon v. Lisk, 153 N. Y. 188, 47 N. E. Rep. 302, 60 Am. St. Rep. 609; Shaw v. Kennedy, 4 N. Car. 591; Hellen v. Noe, 25 N. Car. 493; Whitfield v. Longeast, 28 N. Car. 268; Rose v. Hardie, 98 N. Car. 44, 4 S. E. Rep. 41; Broadfort v. Fayetteville, 121 N. Car. 421, 39 L. R. A. 245, 61 Am. St. Rep. 668; Peck v. Anderson, 57 Cal. 251, 40 Am. Dec. 115; State v. Robbins, 124 Ind. 308, 24 N. E. Rep. 978, 8 L. R. A. 438; Edson v. Crangle, 62 Ohio St. 49, 56 N. E. Rep. 647; Dunn v. Burleigh, 62 Me. 24; Lowery v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; King v. Hayes, 80 Me. 206, 13 Atl. Rep. 882; Osborn v. Charlevoix, 114 Mich. 655, 72 N. W. Rep. 982; Fisher v. McGirr, 1 Gray (67 Mass.) 1, 61 Am. Dec. 381; Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208; Donevan v. Mayor, 29 Miss. 247, 64 Am. Dec. 143; Heise v. Town Council, 6 Rich. Law (S. Car.) 404; Poppen v. Holmes, 44 Ill. 360, 92 Am. Dec. 186; McConnell v. McKillip (Neb.), 61 L. R. A. 610; Boggs v. Commonwealth, 76 Va. 989; Donovan v. State, 34 Ala. 216. We are sorry we have not room for the whole of the dissenting opinion of Justice Cooper for it is certainly one of the ablest upon the questions involved, which has ever been rendered by any court and is one which will give a great deal of comfort to those who are inclined to the views therein so ably sustained. It shows that the weight of authority for ages back has been against

the destruction of property or the depriving a person of his property without a precedent opportunity for a trial of the question by the ordinary methods, in respect to such property which is not *per se* a nuisance. The concurring dissenting opinion by Mr. Justice Walker is also a very able one. We conclude with the following from it:

"I do not think the value of the property has anything to do with the question, or that it should affect the application of the principle in the least. The right of the owner is to have it judicially determined that his property has been forfeited, and this determination must necessarily precede condemnation for any purpose. It can be destroyed to abate the nuisance when the exigency of the situation requires it, because of the paramount right of the state to do so in promotion of the public good, and the interests of the individual will not stand in the way. '*Privatum incommodum publico bono pensatur.*' This is upon the ground of public policy, based upon the maxim that regard be had for the public welfare as the highest law; there being an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property shall under certain circumstances be placed in jeopardy or even sacrificed for the public good. Broom's Legal Maxims (8th Ed.), 1. But the emergency must exist before the right can accrue to the state, and if it does not exist the owner is not required to submit to the destruction of his property, and it cannot be condemned for any purpose without a hearing. The right of the state depends upon the existence of the necessity for the destruction or other summary proceeding and not upon the value of the property; and surely the state cannot merely condemn the property by forfeiture to its own use or to any public use without a hearing as there is no necessity for such action. The fisherman's net may be of little intrinsic value; but, if it is forfeited, the loss to the owner may be far beyond its intrinsic worth. Whether of great or little value, it is his, and cannot be taken from him, even by the most powerful, or by sovereignty itself, except in accordance with the law of the land. That is the shield of the humblest, as well as the most exalted, citizen. What is said by the court in Colman v. Railroad, 138 N. Car. 357, 50 S. E. Rep. 690, aptly and forcibly expresses this thought: 'The plaintiff may be an humble individual, and damages may or may not turn out to be slight. But in the history of English law many important rights have been declared in similar instances of obscure complainants and where the wrong was not of great note by reason of its effect in that particular case.'" It seems to us that the greater weight of reason and authority are with the dissenting opinions, and with them the Journal concurs.

W. A. G.

BOOK REVIEWS.

WARVELLE ON EJECTMENT.

This work is what it is represented to be, a treatise, not a digest. It will be found a very practical aid to the understanding of many perplexing questions. While the questions relative to pleading have not been given a large amount of attention, on the other hand, what is far more important, the proofs have been given most careful attention. The nature of the evidence required to sustain or defeat the action has been very fully considered and the different forms of title that may be involved have had the same kind of treatment. "The citations are liberal." The concluding chapter relates to Forcible Entry and Detainer. The name of George W. Warvelle has already become so familiar to the profession, and that too, so favorably, that this treatise will be received most cordially, particularly in view of the fact that such a work as this is needed. The work is thorough. The style is simple and the statements of the principles clear, concise and sound. A very interesting history of real actions is given, which is of great importance always to a clear understanding of any important subject of our jurisprudence. We have noticed some cases, recently decided, relative to statutory provisions, in which the court seemed ignorant of the history of the law out of which the statute grew, the result being, from our view point, that the court went wrong. It might be possible to find somewhere in this valuable work, by a microscopic examination something in the proof reading or the diction which we could criticise. "Oh that mine enemy might write a book!" We have seen some criticisms of some clever books which seemed to have been made from the standpoint of an enemy. This work, we think, will stand close scrutiny. The changes which have taken place in the last century, in regard to actions which involve disputed titles, have had a wide range, though now reduced by statutory enactments to very simple processes. Every student of the law will find this work not only what he needs in his practice but also interesting reading. The frequency with which the kinds of actions treated of in this work are put into use, makes it one of the necessities in any lawyer's practice.

It is contained in one volume of 679 pages and published by T. H. Flood and Company, Chicago.

HUMOR OF THE LAW.

There was much ado about nothing in the court of common pleas the other day during the trial of a suit against the United Railways & Electric Company for injuries alleged to have been sustained in an accident. The conductor of the car which figured in the accident was on the witness stand, and he was being cross-examined by the attorney for the man who claimed to have been injured.

"What did the people who saw the accident say about it?" the lawyer asked.

Mr. Lee S. Meyer, attorney for the company, objected to the question, and the lawyer on the other side explained that he was trying to develop how the accident occurred. While Judge Sharp was looking up authorities Mr. Meyer withdrew his objection, and the question was again asked. Before the witness could reply Mr. Meyer asked what people were meant by the question, and he objected again when he was told that the lawyer on the other side wanted the witness to repeat what was said by anybody standing around. There was another argument over this objection, which had not been concluded when Judge Sharp asked the witness:

"Did anybody there say anything?"

"No, sir," the witness replied. "Nothing was said by anybody."

The controversy over the admissibility of the question ended in the laughter of the spectators.—*Baltimore Sun.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADVERSE POSSESSION—Character of Possession.—Possession of a farm by a father under an agreement that his son should hold the legal title held not to be adverse.—Allen v. Ellis, Wis., 104 N. W. Rep. 739.

2. ADVERSE POSSESSION—Exclusive Possession.—Occasional cutting trees by person claiming title held to show no right as against persons in actual adverse possession under deeds of record.—Rogers v. Cuyler, Ky., 89 S. W. Rep. 2.

3. ADVERSE POSSESSION—Parol Partition of Land.—A parol division of land, followed by adverse possession of the shares by the respective parties for 15 years, is conclusive.—Caudill v. Bayes, Ky., 89 S. W. Rep. 114.

4. AGRICULTURE—Johnson Grass on Railroad's Right of Way.—A railroad company is not liable for allowing Johnson grass on its right of way, notwithstanding the adjoining owner permits grass communicated from the right of way to mature on his own premises.—San Antonio & A. P. Ry. Co. v. Burns, Tex., 89 S. W. Rep. 21.

5. ALIENS—Admission to Citizenship.—The state held not entitled to intervene in a proceeding to admit an alien to citizenship and procure a vacation of the judgment because procured by fraud and perjury.—Petersen v. State, Tex., 89 S. W. Rep. 81.

6. APPEAL AND ERROR—Assignments of Error.—An assignment of error to on order appointing a receiver and granting an injunction will not be considered where the orders are not quoted in the assignment.—Arnold v. Russell Car & Snow Plow Co., Pa., 61 Atl. Rep. 914.

7. APPEAL AND ERROR—Bill of Exceptions.—A bill of exceptions cannot be considered as a part of the record, in the absence of an order of court filing the same or making it a part of the record.—Holmes v. Robertson County Court, Ky., 89 S. W. Rep. 106.

8. APPEAL AND ERROR—Death of One Co-party Pending Appeal.—Where one of the co-parties dies pending appeal, the failure of the opposite party to suggest the death is an irregularity which may be waived by the survivor.—Seymour v. Bruske, Mich., 104 N. W. Rep. 691.

9. APPEAL AND ERROR—Defects in Pleading.—Defendant, in an action to recover the balance due on a note, held not prejudiced by plaintiff's failure to specifically set out the payments made.—Hawkins v. Merchants' & Mechanics' Loan & Building Assn., Ky., 89 S. W. Rep. 197.

10. APPEAL AND ERROR—Discretion of Trial Court.—A ruling of the circuit court that no foundation has been laid for reception of secondary evidence is discretionary and will not be reviewed where no abuse is shown.—Tucker v. Tucker, S. Car., 51 S. E. Rep. 876.

11. APPEAL AND ERROR—Exclusion of Evidence.—Where the record shows that defendant consented to try a certain issue, he cannot object that an instruction which he requested as to such issue contained bad law.—Davis v. Johnson, Minn., 104 N. W. Rep. 766.

12. APPEAL AND ERROR—Harmless Error.—Refusal to allow cross-examination on a certain subject is harmless, where the party afterwards calls the witness and has opportunity to interrogate him concerninig the same subject.—Hicks v. Harbison-Walker Co., Pa., 61 Atl. Rep. 958.

13. APPEAL AND ERROR—Obstruction in Road.—The error of the court in awarding damages to plaintiff in a suit for the removal of an obstruction in a road held not to require a reversal of the judgment.—Smoot v. Wainscott, Ky., 89 S. W. Rep. 176.

14. APPEAL AND ERROR—Questions Reviewable.—Where exceptions are saved to a ruling sustaining a demurrer to the complaint, an appeal from a decree of dismissal, taken within a year from such ruling, brings up the whole record for review.—Bush v. Prescott & N. W. R. Co., Ark., 89 S. W. Rep. 86.

15. APPEAL AND ERROR—Scope of Review.—On appeal from an order granting a new trial, that the court limited the grounds on which it was granted does not restrict the supreme court, except as to the sufficiency of the evidence when conflicting.—Thompson v. California Const. Co., Cal., 82 Pac. Rep. 867.

16. APPEAL AND ERROR—Will Contest.—On appeal from order vacating order of dismissal of a contest of a will, the supreme court will presume that the trial court had sufficient grounds for such order.—*In re* Sullivan's Estate, Wash., 82 Pac. Rep. 297.

17. ASSIGNMENTS—Assignee's Accounting.—Assignee of a corporation renting corporate premises and conducting business of assignment at his office held entitled to reasonable rental.—*In re* Real Estate Inv. Co.'s Assigned Estate, Pa., 61 Atl. Rep. 924.

18. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Preferences of Claims for Wages.—A trustee for the benefit of creditors held not entitled to a preference over claimants for labor and supplies for money advanced or salary earned prior to the execution of the trust agreement.—Bank of Visalia v. Dillonwood Lumber Co., Cal., 82 Pac. Rep. 374.

19. ATTACHMENT—Interpleader.—On an interplea in attachment where interpleader claims under a mortgage, plaintiff may overcome his right by showing that it was holding the property as pledgee when the mortgage was given.—Ottumwa Nat. Bank v. Totten, Mo., 89 S. W. Rep. 65.

20. BANKRUPTCY—Bonds of Corporation.—Person obtaining bonds of a corporation to secure a loan held entitled on its insolvency and sale of the property under a prior mortgage to have the bonds paid from the surplus of such sale.—Presbyterian Board of Relief for Disabled Ministers, etc. v. Gilbee, Pa., 61 Atl. Rep. 925.

21. BANKRUPTCY—Conditional Sale or Bailment.—A contract under which a safe was delivered to bankrupt construed, and held to constitute a conditional sale, and not a bailment, under the law of Pennsylvania, which gave the seller no right to reclaim the property from the trustee.—*In re* Poore, U. S. D. C., M. D. Pa., 139 Fed. Rep. 862.

22. BANKRUPTCY—Effect of Discharge.—A discharge in bankruptcy held not to release property owned by the

bankrupt when he went into bankruptcy.—McLeod's Trustee v. McLeod, Ky., 89 S. W. Rep. 199.

23. BANKRUPTCY—Title of Vendee.—A party who borrowed money to pay for certain real estate held to take merely an equitable title, subject to a lien in favor of the holder of the note, and his trustee in bankruptcy occupies no more advantageous position.—Beer v. Wisner Neb., 104 N. W. Rep. 757.

24. BILLS AND NOTES—Consideration.—A company's agreement under which it issued bonds held impossible of performance, so as to show a want of consideration of notes given by a buyer of the bonds.—German-American Security Co.'s Assignee v. McCulloch, Ky., 89 S. W. Rep. 5.

25. BOUNDARIES—Agreement Between Parties.—Where adjoining landowners are in dispute over a line, or in doubt as to where the true line is situated, an agreement between them as to the location of the line will be favored by the courts.—Hollingsworth v. Barrett, Ky., 89 S. W. Rep 107.

26. BOUNDARIES—Description in Deed.—Wher. the two ends of a line by the shore are at high water mark, in the absence of other calls the boundary will be construed as excluding the shore.—Whitmore v. Brown, Me., 61 Atl. Rep. 985.

27. BROKERS—Contract for Services.—A contract for broker's services, providing that defendant would pay plaintiff $1,000,000 in case he purchased a certain railroad, either alone or with others, held not to require defendant to refrain from such purchase more than a reasonable time, on pain of being liable on the contract.—Mengis v. Fitzgerald, 95 N. Y. Supp. 486.

28. CANCELLATION OF INSTRUMENTS—Assignment and Compromise.—Assignment and compromise of cause of action fraudulently procured from plaintiff set aside as to her rights and those of one of her attorneys, but sustained as to another attorney, who procured the same.—Bush v. Prescott & N. W. R. Co., Ark., 89 S. W. Rep. 86.

29. CARRIERS—Duty to Receive Infirm Passenger.—A carrier held justified in refusing to sell a ticket to a blind person for a journey necessitating a change of cars, unless he procured the service of an attendant.—Illinois Cent. R. Co. v. Allen, Ky., 89 S. W. Rep. 150.

30. COMMERCE—Taxing Sleeping Cars.—Under Ky. St. 1908, §§ 3174, 4020, a city held authorized to impose a tax on sleeping cars of a foreign corporation engaged in interstate commerce, to the extent of the value of the daily average number of cars within the city limits.—City of Covington v. Pullman Co., Ky., 89 S. W. Rep. 116.

31. COMPROMISE AND SETTLEMENT—Validity.—On an issue of fraud in settlement, the court should have submitted to the jury the question whether the acts relied on as constituting fraud were perpetrated.—Pace v. Paducah Ry. & Light Co., Ky., 89 S. W. Rep. 105.

32. CONSTITUTIONAL LAW—Intoxicating Liquors.—Gen. Laws 1905, p. 626, ch. 346, prohibiting the sale of liquors, and providing for the granting of licenses for the sale of spirituous liquors, is not unconstitutional as violating Constr., art. 3, § 1, relating to the exercise of governmental functions.—State v. Bates, Minn., 104 N. W. Rep. 709.

33. CONSTITUTIONAL LAW—Licenses for Insurance Agents.—The statutes requiring licenses for agents of foreign insurance companies only held not to contravene Const. U. S., art. 4, § 2.—Commonwealth v. Gregory, Ky., 89 S. W. Rep. 168.

34. CONSTITUTIONAL LAW—Police Power.—St. 1903, p. 338, ch. 251, § 1, requiring the stamping of fruit packed for shipment, held not a proper exercise of police power.—*Ex parte* Hayden, Cal., 82 Pac. Rep. 315.

35. CONSTITUTIONAL LAW—Requiring Corporation to Appoint Attorney to Accept Service.—Acts 1905, p. 401, ch. 39, requiring corporations to appoint the auditor as attorney to accept service of process and notice, is not unconstitutional as depriving such corporations of the liberty to contract.—State v. St. Mary's Franco-American Petroleum Co., W. Va., 51 S. E. Rep. 865.

36. CONTRACTS—Agreement for Support.—Mother, who put homestead money into property conveyed to her sons under an agreement that she should have a homestead there, held entitled to a judgment giving her a right to live on the property, but not to an accounting of rents.—Deacon v. Kulmer, Ky., 89 S. W. Rep. 146.

37. CONTRACTS—Consideration.—Where one of the parties to a contract gives up by way of compromise an apparently good claim, the contract is based on a sufficient consideration.—Gaynor v. Quinn, Pa., 61 Atl. Rep. 944.

38. CONTRACTS—For Benefit of Another.—One in whose name a contract was made held entitled to sue on it, though it was made for the benefit of another.—Mills v. Stillwell, Ky., 89 S. W. Rep. 112.

39. CONTRACTS—Impeachment for Fraud.—A written instrument cannot be overthrown by slight parol evidence of fraud, but, to justify the submission of the question of fraud to the jury, the evidence must be clear, precise, and indubitable.—Hicks v. Harbison-Walker Co., Pa., 61 Atl. Rep. 958.

40. CONTRACTS—Inability of Adverse Party to Perform.—A party called on to perform his part of an executory contract may show in defense that the other party cannot perform his part.—German-American Security Co.'s Assignee v. McCulloch, Ky., 89 S. W. Rep. 5.

41. CONTRACTS—Sale of Realty.—Where persons base their claim on a three-sided contract, they cannot avail themselves of those terms which are favorable and reject those which are onerous.—Beer v. Wisner, Neb., 104 N. W. Rep. 757.

42. CONTRACTS—Termination.—That each party to a contract is in default is not alone sufficient, in the face of the claim of each that the contract is in full force as against the other, to terminate the contract.—Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 95 N. Y. Supp. 421.

43. CORPORATIONS—Insolvency.—A creditor of an insolvent corporation held not entitled to relief against stockholders in a suit for distribution of the corporation's assets, where no such relief was demanded by a cross complaint.—Bank of Visalia v. Dillonwood Lumber Co., Cal., 82 Pac. Rep. 374.

44. CORPORATIONS—Security for Indebtedness.—The president of a corporation may take obligations or security from his corporation for an actual indebtedness to himself.—First Nat. Bank v. Commercial Travellers Home Assn., 95 N. Y. Supp. 454.

45. CORPORATIONS—Unwarranted Granting of Injunction.—A court of equity is not warranted in granting an injunction on an *exparte* showing by a minority stockholder on the eve of a corporate election, restraining the legal holders of a majority of the stock from voting the same, with the result of giving the minority stockholders control of the corporation.—Lucas v. Milliken, U. S. C. C., D. S. Car., 139 Fed. Rep. 816.

46. COURTS—Stare Decisis.—Where money is paid in mandamus, and judgment is reversed, a judgment over ruling a motion for restitution in the mandamus proceeding, upon the grounds that respondent's remedy was in an action at law, will be adhered to under the rule of *stare decisis*.—Horton v. Hayden, Neb., 104 N. W. Rep 757.

47. CREDITORS' SUIT—Insolvent Corporation.—A creditor of an insolvent corporation not a party to a suit against directors to recover misappropriated assets held not entitled to recover any part of the proceeds of the settlement.—Niccolls v. Rice, Cal., 82 Pac. Rep. 321.

48. CRIMINAL EVIDENCE—Argument of Attorneys.—The misconduct of attorneys in argument before the jury was reviewable only on abuse of the discretion of the trial court.—Commonwealth v. Ezell, Pa., 61 Atl. Rep. 980.

49. CRIMINAL LAW—Argument of Prosecuting Attorney.—Misconduct of a prosecuting attorney in referring in his opening statement to an alleged confession by defendant, which he did not introduce in evidence, held not reversible error.—State v. Williams, Nev., 82 Pac. Rep. 358.

50. CRIMINAL TRIAL—Bill of Exceptions.—Alleged improper statements of counsel in argument must have been objected to, and such statements, with the objections and rulings of the court, must be preserved in the bill of exceptions.—Connolly v. State, Neb., 104 N. W. Rep. 754.

51. DAMAGES—Notice of Contested Issues.—A notice of issues to be contested on a hearing in damages after a default in an action of tort puts in issue the contested paragraphs of the complaint.—O'Keefe v. Scoville Mfg. Co., Conn., 61 Atl. Rep. 961.

52. DAMAGES—Stipulated Damages.—Agreement in a building contract held so uncertain as to the manner in which deductions are to be computed, as to justify a holding that provision referred to did not constitute an agreement to pay stipulated damages.—Robertson v. Village of Grand Rapids, Minn., 104 N. W. Rep. 715.

53. DEEDS—Delivery After Grantor's Death.—A deed delivered in *escrow* to be delivered after the grantor's death, but with the condition that the grantor might be entitled to the same on payment of certain advances, held ineffectual to pass title to the grantee.—Keyes v. Meyers, Cal., 82 Pac. Rep. 804.

54. DEPOSITIONS—Objection to Commission.—Where a party files cross-interrogatories, and participates in the taking of a deposition, he thereby waives objection to the commission under which the deposition was taken. —Palatine Ins. Co., Limited, of Manchester, England v. Santa Fe Mercantile Co., N. M., 82 Pac. Rep. 868.

55. DOWER—Rights of Widow.—Where an owner of an undivided interest in land died without procuring a partition thereof, his widow could not claim any certain part as her dower interest.—Bloom v. Sawyer, Ky., 89 S. W. Rep. 204.

56. EASEMENTS—Way of Necessity.—A prescriptive right to use the waters of a well carries with it the right to pass to and over the well lot to get water from the well.—McPherson v. Thompson, Ky., 89 S. W. Rep. 195.

57. ELECTIONS—Bribery at Primary.—The question whether successful party at a primary election was guilty of bribery cannot be collaterally inquired into by a suit to require the clerk of the county court to remove such party's name from the poll books.—Whitaker v. Swanner, Ky., 89 S. W. Rep. 184.

58. ELECTIONS—Contest Over Nomination.—The court may compel the committee of a political party to hear a contest for the nomination of a candidate to office at a primary election, but it cannot direct as to how it shall decide, nor what evidence it shall receive.—Lucas v. Avis, Ky., 89 S. W. Rep. 1.

59. EMINENT DOMAIN—Duty of Viewers in Determining Damages.—Under Act March 27, 1848 (P. L. 278), viewers must first determine whether any damages have been sustained by the landowner, and, if so, their extent.—William H. Moudy Mfg. Co. v. Pennsylvania R. Co., Pa., 61 Atl. Rep. 906.

60. EMINENT DOMAIN—Vacation of Highway.—The vacation of a road by a railroad company does not render it liable in damages to a landowner, where it substitutes another road for the one vacated.—Rockafeller v. Northern Cent. Ry. Co., Pa., 61 Atl. Rep. 960.

61. EQUITY—Waiver of Objection.—Where, in a suit in equity to obtain relief for which there was an adequate remedy at law, defendant answered, it thereby left it to the discretion of the court to retain or reject jurisdiction.—Hoagland v. Supreme Council, Royal Arcanum, N. J., 61 Atl. Rep. 982.

62. ESTOPPEL—Deeds.—A deed of bargain and sale held to estop an infant grantor from setting up as against the grantees an after acquired title.—Weeks v. Wilkins, N. Car., 51 S. E. Rep. 909.

63. ESTOPPEL—Settlement Deed.—Beneficiary in settlement deed given to procure a discharge of an estate from liability could not accept the benefits thereof and at the same time assert a claim hostile thereto.—Estill's Trustee v. Francis, Ky., 89 S. W. Rep. 172.

64. EVIDENCE—Explanation.—A party, explaining the circumstances under which he made the statements proved by the adverse party, is not entitled to give the statements of his attorney in relation to his liability.—Bartley v. Comer, Tex., 89 S. W. Rep. 82.

65. EVIDENCE—Fraudulent Sale.—On the issue whether a sale is fraudulent as against creditors, it is not error to allow the buyer and seller to testify directly as to their intent in making the sale.—Hill v. Page, 95 N. Y. Supp. 465.

66. EVIDENCE—Irrigation Ditch.—In a suit to restrain maintenance of an irrigation ditch over plaintiff's land, evidence in respect to the construction of defendant's ditch over other lands held immaterial.—Vestal v. Young, Cal., 82 Pac. Rep. 883.

67. EVIDENCE—Res Gestæ.—A statement by defendant's foreman the day after the burning of plaintiff's field by fire from sparks from defendant's harvesting engine held not a part of the *res gestæ*, and inadmissible. —Quint v. Dimond, Cal., 82 Pac. Rep. 810.

68. EXCEPTIONS, BILL OF—Correction by Judge.—Where a bill of exceptions is tendered within time, the judge may make such corrections as are necessary before he signs it, although he signs it at a subsequent term.—Proctor Coal Co. v. Strunk, Ky., 89 S. W. Rep. 145.

69. EXECUTION—Bona Fide Purchaser at Sale.—The rule relating to when a purchaser at execution sale may not be a *bona fide* purchaser held applicable only to a case where the purchaser claims to be a *bona fide* purchaser without notice of a prior conveyance.—Clark v. Bell, Tex., 89 S. W. Rep. 38.

70. EXECUTORS AND ADMINISTRATORS—Sole Devisee.—When it is sought to sell the interest of the sole devisee of a deceased executor to satisfy a judgment against the estate of the executor, the interest of the devisee may be sold.—Frazer v. Fidelity & Deposit Co., Ky., 89 S. W. Rep. 134.

71. EXECUTORS AND ADMINISTRATORS—Note Due Administrator.—Where the executor holds a note of the decedent, the fact that it was overdue at the time of decedent's death does not compel the administrator to prove negatively that he did not hold the note in his individual right, in the absence of fraud.—*In re* McPherran's Estate, Pa., 61 Atl. Rep. 954.

72. EXECUTORS AND ADMINISTRATORS—Payment o Debts.—In an action against infant heirs to procure a sale of their ancestor's land to pay debts, the court cannot take the allegations as confessed, but they must be supported by proof.—Tabb v. Wortham's Adm'r, Ky., 89 S. W. Rep. 191.

73. FIRE INSURANCE—Different Kinds of Property.—Insurance taken on different kinds of property separately valued held a severable contract, though only one premium was paid, and the amount insured was the sum of the valuations.—Miller v. Gibbs, 95 N. Y. Supp. 885.

74. FIRE INSURANCE—Notice of Non-Payment of Assessment.—If an insurer sends notice of an assessment by mail, properly addressed and stamped, the law presumes the addressee received it.—Sherrod v. Farmers' Mut. Fire Ins. Ass'n, N. Car., 51 S. E. Rep. 910.

75. FRAUDULENT CONVEYANCES—Grantee's Knowledge of Fraud.—Where a debtor conveys all his property in payment of a debt, and the value of the property greatly exceeds the amount of the debt, the conveyance is fraudulent as against the other creditors of the debtor.—Clark v. Bell, Tex., 89 S. W. Rep. 38.

76. GAME—Prohibition of Sale.—Laws 1903, p. 606, ch. 336, § 45, declaring that no person shall at any time sell any ruffed grouse, though construed as applying to ruffed grouse not captured within the state, is not in conflict with the federal or state constitutions.—State v. Shattuck, Minn., 104 N. W. Rep. 719.

77. HIGHWAYS—Obstruction by Railroad.—One for whom another holds the legal title to lots as trustee held entitled to sue for damages for obstruction of the highway on which they abut.—Yates v. Big Sandy Ry. Co., Ky., 89 S. W. Rep. 108.

78. HIGHWAYS—Vacation.—Abutting owners are not entitled to compensation on the vacation of a public road.—Howell v. Morrisville Borough, Pa., 61 Atl. Rep. 932.

79. HUSBAND AND WIFE—Community Property. — The presumption is that property purchased during marriage belongs to the community, and the burden of proof is on the party asserting the contrary.—Hoopes v. Mathis, Tex., 89 S. W. Rep. 36.

80. HUSBAND AND WIFE—Validity of Deed by Wife.—A deed made by a married woman to her husband while living together, in which the husband did not join, passed no title either legal or equitable.—Smith v. Vineyard, W. Va., 51 S. E. Rep. 871.

81. INJUNCTION—Contract of Employment.—Where a servant did not contract to render special services, his employer was not entitled to restrain him from entering the employment of another during the term contracted for.—Taylor Iron & Steel Co. v. Nichols, N. J., 61 Atl. Rep. 946.

82. INTEREST — Discharge of School Teacher.—The claim of a school teacher for breach of contract in refusing to permit him to perform held a liquidated claim on which he was entitled to recover interest.—Shaul v. Board of Education of City of New York, 95 N. Y. Supp. 479.

83. JUDICIAL SALES—Acceptance of Deed.—Entry into possession under judicial deed, and occupying premises for 20 years, held to raise presumption of acquiescence in any limitations in the deed.—Corbett v. Fogle, S. Car. 51 S. E. Rep. 884.

84. LANDLORD AND TENANT—Cancellation of Lease.—In a suit to cancel a lease, the contract held executed as to the part of the term which had expired, so that the lessor was not required to tender rent paid, as a condition to cancellation.—Isom v. Rex Crude Oil Co., Cal., 82 Pac. Rep. 317.

85. LANDLORD AND TENANT — Emblements. — Tenant from year to year terminating lease by notice to landlord held not entitled to emblements.—Hatfield v. Lawton, 95 N. Y. Supp. 451.

86. LANDLORD AND TENANT—Liability as to Third Persons.—Tenant and not landlord held liable for injuries caused by defects in sidewalk.—Lindstrom v. Pennsylvania Co. for Ins. on Lives and Granting Annuities, Pa., 61 Atl. Rep. 940.

87. LARCENY—Pledging Borrowed Property.—One who pledges borrowed property with the intention of redeeming and restoring it to the owner, and having a fair and reasonable expectation of so doing, is not guilty of larceny.—Blackburn v. Commonwealth, Ky., 89 S. W. Rep. 160.

89. LIFE INSURANCE — Suicide. — Suicide by insured while unconscious that he was taking his life, owing to mental disease, held not suicide within a clause of the policy exempting the insurer from liability therefor.—Masonic Life Ass'n of Western New York v. Pollard's Guardian, Ky., 89 S. W. Rep. 219.

90. LIMITATION OF ACTIONS—Interruption of Statute.—The statute of limitations is not tolled by the allowance of a dividend from an assigned estate and the payment of it by the assignee.—Walter A. Wood Mowing & Reaping Mach. Co. v. Harris, Penn., 61 Atl. Rep. 996.

91. LIMITATION OF ACTIONS—Operation on Defense.—The statute of limitations applies alone to plaintiff's cause of action, and so long as the courts will hear plaintiff's case, time cannot bar the defense.—Aultman & Taylor Co. v. Meade, Ky., 89 S. W. Rep. 137.

92. LIS PENDENS — Garnishment. — The assignee of a judgment under an assignment made after the commencement of a garnishment action, is a stranger to the garnishment action, and the judgment therein is not conclusive in his favor. — Allen v. Ellis, Wis., 104 N. W. Rep. 739.

93. LOGS AND LOGGING—Tender of Performance. — Tender of the contract price, under a contract for the sale of timber, held not a condition precedent to an action by the purchaser for damages owing to the seller having no title.—Barnes v. F. Weikel Chair Co., Ky., 89 S. W. Rep. 222.

94. MANDAMUS—Questions Considered on Application. —On *mandamus* to compel entry of judgment by a judge, the court will not consider the private motives of the judge, nor his estimate of counsel.—Alexander v. Moss, Ky., 89 S. W. Rep. 118.

95. MASTER AND SERVANT — Assumption of Risk.—A servant does not assume the risk incident to an unsafe place to work, where knowledge on his part of the danger is wanting.—Calloway v. Agar Packing Co., Iowa, 104 N. W. Rep. 721.

96. MASTER AND SERVANT — Assumption of Risk. — A servant assumes the usual risks of his employment, but not unusual risks, unless he knows or has means of knowing the precise danger. — Hocking v. Windsor Spring Co., Wis., 104 N. W. Rep. 705.

97. MASTER AND SERVANT—Fellow Servants. — Under the law of Tennessee, crews on freight and passenger trains held fellow servants up to the occurrence of a certain accident, at which time the conductor of the freight train became a vice principal of the railroad. — Cincinnati, N. O. & T. P. Ry. Co. v. Curd, Ky., 89 S. W. Rep. 140.

98. MASTER AND SERVANT—Incompetency of Fellow-Servant.—An employer is liable to an employee for injuries resulting from a failure to exercise reasonable care in selecting co-employees or in retaining co-employees when their incompetency is known, or by the exercise of reasonable care might have been known.—Gulf, C. & S. F. Ry. Co. v. Hays, Tex., 89 S. W. Rep. 29.

99. MASTER AND SERVANT — Instructions in Personal Injury Case.—In an action for injuries to a railroad fireman, an instruction held not erroneous on the theory that it made defendant liable for the negligence of the engineer.—Illinois Cent. R. Co. v. Qurey, Ky., 89 S. W. Rep. 217.

100. MINES AND MINERALS—Assignment of Oil Lease.—Assignees of the holders of an oil lease held estopped to defend a suit for cancellation of a conveyance of a part interest in the well.—Rowland v. Cox, Ky., 89 S. W. Rep. 215.

101. MINES AND MINERALS—Foreclosure of Mortgage.—That a purchaser under a foreclosure decree against an executor collected rent which accrued before sale held not ground for setting aside sale at suit of a special administratrix.—Bell v. Thompson, Cal., 82 Pac. Rep. 327.

102. MONEY PAID—When Action Maintainable.—Where a sister, at her brother's request, takes an assignment of his notes and mortgages, and delivers the canceled notes to her brother, and satisfies the mortgage, she can sue on the common counts for money paid. — Foster v. Gordon, Minn., 104 N. W. Rep. 765.

103. MECHANICS' LIENS—Effect of Taking a Note.—The taking of a note of the contractor by a subcontractor for a debt which is a lien, and the negotiation of the note at a bank, will not impair the subcontractor's lien where he is compelled to take up the note.—Mivelaz v. Genovely, Ky., 89 S. W. Rep. 109.

104. MORTGAGE—Sale by Mortgagee. — A mortgagee, selling mortgaged property on default of the mortgagor under power of sale, is bound to conduct it so as to produce the best price.—Aultman & Taylor v. Meade, Ky., 89 S. W. Rep. 137.

105. MUNICIPAL CORPORATIONS—Alderman's Term of Office.—An agreement between members of a board of aldermen by which one of them agreed to accept a short term in consideration of being appointed president of the board held not contrary to public policy.—Hobbs v. Upington, Ky., 89 S. W. Rep. 128.

106. MUNICIPAL CORPORATIONS—Board of Alderman.—Members of a city board of aldermen elected at a particular election held not entitled to vote on the question as to which of them was elected for a short term to fill a vacancy.—Hobbs v. Upington, Ky., 89 S. W. Rep. 128.

107. MUNICIPAL CORPORATIONS—Defect in Sewage Sys-

tem.—Where a city learns of defects in its plan of an executed sewage system and fails to repair, it is responsible for resulting damages.—Hart v. City of Neillsville Wis., 104 N. W. Rep. 699.

108. MUNICIPAL CORPORATIONS—Defective Sidewalks.—Where a city had acquired notice of a defective sidewalk, the obligation of its board of public works to repair was not affected by the board's insufficient notice to adjoining owners to repair.—Heath v. Manson, Cal., 82 Pac. Rep. 331.

109. MUNICIPAL CORPORATIONS—Public Improvement.—An assessment for a municipal improvement is not void because the contract was let and executed, the bond approved, and the work completed before opportunity was given landowners to be heard.—Parsons v City of Grand Rapids, Mich., 104 N. W. Rep. 730.

110. MUNICIPAL CORPORATIONS — Right to Construct Drain Over Private Property.—A municipal corporation held to have power to construct a public storm drain along a ravine and over private property at the joint expense of the city and private property owners.—Kramer v. City of Los Angeles, Cal., 82 Pac. Rep. 334.

111. NEGLIGENCE—Care Required Toward Persons Invited on Premises.—One in control of premises, and serving meals thereon, was bound to have the premises in a reasonably safe condition.—Schnizer v. Phillips, 95 N. Y. Supp. 478.

112. NEGLIGENCE—Pleading.—A plaintiff suing for a personal injury negligently inflicted by another need not aver in his petition the absence of contributory negligence.—Board of Councilmen of City of Frankfort v. Chinn, Ky., 89 S. W. Rep. 188.

113. NOTARIES—False Certificate of Affidavit.—The negligence of plaintiff in relying on the false certificate of a notary, and the fraud of persons in selling him homestead claims, and not the affidavit of the notary, held to be the proximate cause of plaintiff's injury.—Smith v. Maginnis, Ark., 89 S. W. Rep. 91.

114. PARTITION—Parties.—In partition of decedent's land, widow to whom certain of the heirs have assigned the life interest must be made a party.—Stickles v. Oviatt, Pa., 61 Atl. Rep. 909.

115. PARTNERS—What Constitutes.—As between themselves, parties are partners where they intended to combine their property, labor, and skill in an enterprise as principals for the purpose of joint profits.—McDonald Bros. v. Campbell & Bergeson, Minn., 104 N. W. Rep. 760.

116. PARTNERSHIP—Death of Partner.—For a surviving partner to have the county court grant administration to appoint appraisers of the partnership property held proper practice.—Swafford's Admr. v. White, Ky., 89 S. W. Rep. 129.

117. PATENTS—Assignment.—Assignees of patent rights held under no obligation to pay a sum of money conditionally stipulated to be paid for the assignment, and the assignor was not entitled to a rescission for their failure so to do.—Comer v. Byars, Tex., 89 S. W. Rep. 80.

118. PLEADING—Extension of Time.—Where time was given to amend a complaint the court had jurisdiction, before the expiration of the time so given, to grant successive orders extending the time.—Vestal v. Young, Cal., 82 Pac. Rep. 381.

119. PRINCIPAL AND SURETY—Construction of Contract.—The contract of a surety is to be given no retroactive effect, so as to cover past delinquencies, unless it in express terms provides that it shall have that effect.—United States Fidelity & Guaranty Co. v. Fultz, Ark., 89 S. W. Rep. 93.

120. PROHIBITION—Want of Jurisdiction.—Prohibition is the proper remedy where a city seeks to prosecute petitioner for an offense committed in territory not legally annexed to the corporate limits of the city.—City of Bardstown v. Hurst, Ky., 89 S. W. Rep. 147.

121. RAILROADS—Burden of Proving Negligence.—In an action against a railway company for negligently killing a person on its track, plaintiff must show negligence on the part of the employees in charge of the train.—Hutchens v. St. Louis Southwestern Ry. Co., Tex., 89 S. W. Rep. 24.

122. RAILROADS—Duty to Fence.—A railroad owes no duty to fence its road as to the owner of a horse in the pasture of a third person, which does not join the railroad.—Russell v. Maine Cent. R. Co., Me., 61 Atl. Rep. 899.

123. RAILROADS—Estoppel to Allege Error.—A railway company requesting a charge involving the reasonableness of a regulation for the movement of trains, held not entitled to complain of the court's action in submitting the same question.—Gulf, C. & S. F. Ry. Co. v. Hays, Tex., 89 S. W. Rep. 29.

124. RAILROADS—Negligence in Running Behind Schedule.—That passenger trains run 25 minutes behind schedule time held not negligence.—Keiser v. Lehigh Valley R. Co., Pa., 61 Atl. Rep. 903.

125. REMOVAL OF CAUSES—Federal Jurisdiction.—In a suit by a stockholder against the corporation and other stockholders to prevent the consummation of an alleged conspiracy by the latter to obtain control of the corporation to the detriment of its interests, the corporation must be aligned with complainant for the purposes of federal jurisdiction.—Lucas v. Milliken, U. S. C. C., D. S Car., 139 Fed. Rep. 816.

126. REMOVAL OF CAUSES—Unauthorized Removal.—Where the state court refused to remove a cause to the federal court, defendant's act in having the record copied, and filing the same with the clerk of the federal court, did not carry the case into the federal court in such sense as to render it a pending action there.—Cincinnati, N. O. & T. P. Ry. Co. v. Curd, Ky., 89 S. W. Rep. 140.

127. SALES—Breach of Warranty.—The burden of proof is on the buyer setting up a warranty in the sale of personalty to establish that a warranty was made and that a breach has occurred.—Wallace v. Douglas, W. Va., 51 S. E. Rep. 869.

128. SALES—Liability for Necessaries.—A husband and father held not relieved from liability for necessaries furnished for the family, by an arrangement with adult daughters to run the house.—Wentz v. McCann, 95 N. Y. Supp. 462.

129. SALES—Necessity of Recording Conditional Sale.—Linoleum, sold to be used in a store, held household furniture within the provision of Gen. St. 1902, § 4864, providing that contracts of conditional sales of household furniture need not be recorded, etc.—Boston Furniture Co. v. Thoms, Conn., 61 Atl. Rep. 949.

130. SHIPPING — Injury to Steerage Passengers. — A steamship was negligent in requiring steerage passengers to come onto the upper deck to receive their food in weather so stormy as to make it dangerous, and is liable for the injury of a passenger, while so on deck, by being thown down by a wave which came over the deck.—The Prinzess Irene, U. S. D. C., S. D. N. Y., 139 Fed. Rep. 810.

131. SHIPPING—Liability of Carrier as Warehouseman—Goods having been landed on a carrier's wharf, the consignee notified, and the freight having been paid, the carrier's liability for a part of the goods not removed held that of a warehouseman or wharfinger only.—Stone & Co. v. Clyde S. S. Co., N. Car., 51 S. E. Rep. 894.

132. STATUTES — Amendatory Acts. — A statute purporting to amend a repealed statute is valid where the provisions of the new statute are independent and complete in themselves.—Attorney General v. Stryker, Mich., 104 N. W. Rep. 137.

133. STATUTES—Inconsistent Provisions. — Where the first section of a law conforms to the obvious intent of the legislature, it is not rendered inoperative by inconsistent provisions in a later section.—State v. Bates, Minn., 104 N. W. Rep. 709.

134. STATUTES—Licenses for Insurance Agents.—The statutes as to insurance companies held to have a contemporaneous construction as not requiring licenses for agents of domestic companies.—Commonwealth v. Gregory, Ky., 89 S. W. Rep. 168.

135. STREET RAILROADS—Care Required of Infant in Crossing Track.—A child 10 years old crossing a street railway track is bound to use that degree of care which ordinary prudent children of her age and intelligence use.—Colcomb v. Portland & B. St. Ry., Me., 61 Atl. Rep. 898.

136. STREET RAILROADS—Collision and Burden of Rebutting Negligence.—Where person riding on running board of summer car is killed in collision, the burden is on the company to rebut presumption of negligence.—Abel v. Northampton Traction Co., Pa., 61 Atl. Rep. 915.

137. TAXATION—Property Wrongfully Held by Railroad.—Taxing officers are not intrusted with the power of passing on whether a railroad owns property which it is not authorized to own by the laws of the state.—Commonwealth v. Ingalls, Ky., 89 S. W. Rep. 156.

138. TAXATION—Restraining Collection.—A taxpayer, seeking to enjoin the collection of a tax, may be required by the court, under the prayer of the counterclaim of the municipality imposing the tax, to pay the tax into court.—City of Covington v. Pullman Co., Ky., 89 S. W. Rep. 116.

139. TELEGRAPHS AND TELEPHONES—Mental Anguish as an Element of Damages.—The addressee of a telegram held entitled to recover compensatory damages for mental anguish, independent of bodily or substantial pecuniary injury, for failure to deliver a message.—Dayvis v. Western Union Telegraph Co., N. Car., 51 S. E. Rep. 898.

140. TENANCY IN COMMON—Dower.—The entry into possession of land by a widow to whom dower has been awarded held to inure for the benefit of the co-tenants of the deceased husband.—Bloom v. Sawyer, Ky., 89 S W. Rep. 204.

141. TRIAL—Alienation of Affection.—Where defendants were jointly charged with alienating the affections of plaintiff's husband, she was entitled to prove the financial standing of one of the defendants for the purpose of supporting compensatory damages.—Leavell v. Leavell, Mo., 89 S. W. Rep. 55.

142. TRIAL—Direction of Verdict.—To warrant the court in withdrawing a case from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.—Hutchens v. St. Louis Southwestern Ry. Co., Tex., 89 S. W. Rep. 24.

143. TRIAL—Newly Discovered Evidence.—A new trial will not be granted for case of newly discovered evidence in order to give the defeated party an opportunity to attack a witness for the successful party.—Gulf, C. & S. F. Ry. Co. v. Hays, Tex., 89 S. W. Rep. 29.

144. TRIAL—Motion for Nonsuit.—The granting of a motion for nonsuit will be held erroneous where the record fails to show that any specification of grounds for the motion was made.—DeLeonis v. Hammel, Cal., 82 Pac. Rep. 349.

145. TRUSTS—Employment Contract.—A contract by a corporation employing L to undertake control of its corporate business, to the extent of financing it, etc., held not to create a trust.—Bank of Visalia v. Dillonwood Lumber Co., Cal., 82 Pac. Rep. 374.

146. TRUSTS—Estoppel.—Where an involuntary trustee acquired title to the property mortgaged by a judgment of foreclosure and sale, such judgment did not operate as an estoppel as against the beneficiary.—Smith v. Goethe, Cal., 82 Pac. Rep. 384.

147. TRUSTS—Renouncement by Trustee.—The refusal of a trustee of an active trust created by will to accept the trust does not vest title to the trust fund in the *cestui que* trust.—Bennett v. Bennett, Ill., 75 N. E. Rep. 339.

148. TRUSTS—Sale by Trustee.—A trustee of a farm devised to one for life with remainder to others held t have power to give part of it for services of a person in making it available for building purposes.—Smith v. Nones, Ky., 89 S. W. Rep. 153.

149. TRUSTS—Statutes of Uses.—The statutes of uses held to execute the unnecessary portion of a trustee' estate.—Smith v. Procter, N. Car., 51 S. E. Rep. 889.

150. VENDOR AND PURCHASER—Fraud of Vendor.—Where the vendor conceals from, or misrepresents to, the vendee the true boundary of the land conveyed, the vendee may maintain an action for rescission of the contract of purchase.—Lainhart v. Gabbard, Ky., 89 S W. Rep. 10.

151. VENUE—Enjoining Enlargement of Waterway. A suit to restrain the enlargement of artificial water courses constructed by other townships in other counties held properly brought in the county in which complainant township was located.—Merritt Tp. v. Harp, Mich., 104 N. W. Rep. 587.

152. WATERS AND WATER COURSES—Irrigation Ditch.—That plaintiff's land, over which defendants sought to construct an irrigation ditch additional to that they had an easement to maintain, was of no appreciable value, held no defense to plaintiff's right to restrain such act.—Vestal v. Young, Cal., 82 Pac. Rep. 383.

153. WATERS AND WATER COURSES—Limitation of Actions.—Limitations for injury from the overflowing of a culvert by which defendant diverted water from a stream held to run from the time of the injury, and not of the diversion.—Illinois Cent. R. Co. v. Taylor, Ky., 89 S. W. Rep. 121.

154. WEAPONS—Carrying Concealed Weapons.—Where one charged with carrying a concealed weapon had good ground to apprehend an attack from another at the time and place of carrying it, the jury may consider the fact in justification or in mitigation.—Maxwell v. State, Ala., 39 So. Rep. 382.

155. WILLS—Capacity to Take Bequest.—An unincorporated voluntary association, organized for the furtherance of spiritualism, is incapable of taking a direct bequest.—Fralick v. Lyford, 95 N. Y. Supp. 433.

156. WILLS—Estate Devised.—Will held to give testator's widow a life estate, with added power of disposition and remainder to children in residuum not disposed of by widow.—Pedigo's Ex'x. v. Botts, Ky., 89 S. W. Rep. 164.

157. WILLS—Rule in Shelley's Case.—Rule in Shelley's case, while applicable to personal property, must give way in such case before testator's expressed intention.—Bennett v. Bennett, Ill., 75 N. E. Rep. 339.

158. WITNESSES—Credibility.—The membership of a witness in the same labor union as the party for whom he is testifying may be shown to affect his credibility.—People v. Cowan, Cal., 82 Pac. Rep. 339.

159. WITNESSES—Cross-Examination.—A witness, having testified to the reputation of a party, held properly asked on cross-examination if he had ever heard of the party's difficulty with a widow concerning some money transaction.—Leavell v. Leavell, Mo., 89 S. W. Rep. 55.

160. WITNESSES—Cross-Examination.—In a prosecution for homicide, held within the discretion of the court to permit the state's attorney to ask defendant on cross-examination whether he would have given certain ribbon to some children if he had remembered that he had it.—State v. Sherouk, Conn., 61 Atl. Rep. 897.

161. WITNESSES—Impeachment.—The impeachment of a witness by statements contradictory of his testimony may not be met by statements at other times in harmony with his testimony.—People v. Turner, Cal., 82 Pac. Rep. 397.

162. WITNESSES—Inconsistent Statements.—Discrepancies in testimony given upon various examinations held not to justify the court in disregarding the testimony.—Allen v. Ellis, Wis., 104 N. W. Rep. 739.

163. WITNESSES—Omnibus Subpœna Duces Tecum.—A court will not punish a party for contempt for failure to obey a *subpœna duces tecum* requiring the production of a large list of books and papers, many of which apparently can have no bearing on the issues raised by the pleadings.—Miller v. Mutual Reserve Fund Life Assn., U. S. C. C., 139 Fed. Rep. 864.